83-468

No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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September 19, 1983

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

I. Whether the Interstate Commerce Commission, in an unprecedented action without statutory or other legal authority, could compel a rail carrier to sell a one-half interest in an operating rail line to another carrier on terms and at a price prescribed by the Commission.

II. Whether, even assuming the Commission had the power to order a forced sale in these circumstances, its asserted reasons for the forced sale were ex post facto rationalizations not based on substantial evidence or an adequate record, and the price and terms it imposed were arbitrary and capricious in that, among other things, the Commission failed to compensate the selling carrier adequately for the risks it bore in constructing the rail line without assistance from the purchasing carrier.

LIST OF CORPORATE SUBSIDIARIES AND AFFILIATES

Petitioner's parent company is Burlington Northern Inc. The partially-owned subsidiaries and affiliates of the petitioner are:

BN Financial Services Inc.
BN Timberlands Inc.
Burlington Northern Airmotive Inc.
Burlington Northern International Services Inc.
The Belt Railway Company of Chicago
Camas Prairie Railroad Company
Chicago Union Station Company
Davenport, Rock Island and North Western Railway Company
The Denver Union Terminal Railway Company
Galveston Terminal Railway Company
Houston Belt & Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
The Lake Superior Terminal and Transfer Railway Company
Longview Switching Company
The Minnesota Transfer Railway Company
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
The Pueblo Union Depot and Railroad Company
The Saint Paul Union Depot Company
Terminal Railroad Association of St. Louis
Trailer Train Company
The Wichita Union Terminal Railway Company
Winona Bridge Railway Company
Glacier Park Company
Glacier Park Liquidating Company
Meridian Land & Mineral Company

Milestone Petroleum Inc.
Butte Pipe Line Company
Portal Pipe Line Company
New Mexico and Arizona Land Company
Plum Creek Inc.
P-H Holdings Corporation
The El Paso Company

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner Burlington Northern Railroad Company respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on March 29, 1983.

OPINIONS BELOW

The judgment of the Court of Appeals, which is noted at 704 F.2d 1293 (D.C. Cir. 1983), appears in the Appendix at 1a to 2a. The memorandum opinion issued by the panel in connection with the denial of rehearing appears in the Appendix at 5a to 7a. The November 3, 1982 decision of the Interstate Commerce Commission appears in the Appendix at 8a to 10a. The October 22, 1982 decision of the Commission appears in the Appendix at 11a to 40a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on March 29, 1983. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on June 21, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Sections 10901, 11701, 11343 and 11344 of the Revised Interstate Commerce Act, 49 U.S.C. §§ 10901, 11701, 11343 and 11344 (Supp. V 1981), are set forth in the Appendix at 80a to 89a. Section 10(e) of the Administrative Procedure Act, 5 U.S.C. § 706 (1976), is set forth in the Appenidx at 89a to 90a.

STATEMENT OF THE CASE

This case concerns a 103-mile segment of rail line in the southern Powder River Basin area of Wyoming which was built by petitioner Burlington Northern Railroad Company [1] between 1976 and 1979 to move large volumes of coal. BN originally applied to the ICC in 1972 to construct this line as an independent project. In 1973, Chicago and North Western Transportation Company [2] applied to build a 76-mile line into the Basin on a parallel route. The Commission, concerned with the environmental problems of building parallel rail lines through the area, persuaded the parties to consolidate their applications into a single proposal for a joint line.

On January 9, 1976, the Commission granted a certificate approving the Powder River Basin line, which was

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[1] Burlington Northern Railroad Company was formerly known as Burlington Northern Inc., a name now used for BN's parent holding company.

[2] "North Western" will be used to refer to the Chicago and North Western Transportation Company and its wholly-owned subsidiary, Western Railroad Properties, Incorporated.

to be the longest new rail line in the United States since 1931. *Burlington Northern, Inc.*, 348 I.C.C. 388 (1976), *petition for review dismissed sub nom. Sierra Club v. United States*, No. 76-1557 (D.C. Cir. Dec. 21, 1978) [hereinafter cited as *1976 Decision*].[3] In its decision, the Commission carefully noted that the issue before it was whether "the present or future public convenience and necessity requires or will require the construction and operation of the proposed line." 348 I.C.C. at 400, App. at 71a. The Commission's sole reason for authorizing "joint" authority was "to avoid the construction of essentially parallel lines by the applicants." *Id.* at 399, App. at 71a. As the Commission observed, "Two railroads serving the same territory over separate lines would result in wasteful and improvident expenditures for construction which are not necessary to insure adequate service, especially in view of the environmental and financial considerations involved." *Id.*

At no point in its *1976 Decision* did the Commission advert to competition as a rationale for its decision, nor did it suggest that the presence of both BN and North Western was essential to effectuate the authority. To the contrary, the Commission reserved the authority to disapprove North Western's future financing plans, thus indicating the distinct possibility that North Western might never be able to exercise its share of the joint authority. *Id.* at 402, App. at 74a-75a; *see also id.* at 406, App. at 79a (Commissioner O'Neal, dissenting in part) ("North Western has not provided evidence . . . sufficient . . . to demonstrate its ability to finance the proposed construction and operation without detracting from its ability to perform its common carrier obligation.").

The Commission's *1976 Decision*, by its terms, was thus entirely permissive; that is, it authorized both parties

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[3] For the convenience of the Court, the text of the *1976 Decision* is reprinted in the Appendix at 56a to 79a.

together, or either party singly, to go forward with construction and operation of the line. If an unwilling partner chose not to exercise its share of the authority, there was no condition, either express or implied, preventing the willing partner from going forward without further Commission approval. Similarly, the Commission could in no way compel an unwilling partner to go forward.

At the time of the certification decision, BN and North Western had already negotiated a draft agreement governing construction and operation of the line. *See* App. at 46a. Under this agreement, the parties were to share equally in the construction costs and each was to own an undivided one-half interest in the facilities. BN began construction, but North Western failed to pay its share of the construction costs. On two occasions, BN voluntarily extended the payment deadline, but North Western still failed to pay. In late 1979, BN completed construction and started single-carrier operations on the new line. App. at 47a.

Despite North Western's repeated contractual defaults, it continued to insist upon a right not only to participate in the project, but to do so on the original terms.[4] On February 19, 1982, North Western asked the ICC to prescribe the terms of the 1975 agreement as a basis for North Western to re-enter the Powder River Basin project. *See* App. at 48a-49a. BN responded by pointing out that prescription was both unfair and unnecessary, since BN was already negotiating in good faith with North Western for sale of a one-half interest in the line. None-

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[4] To attract financing, North Western redesigned its proposal to transport coal from the Powder River Basin, bringing in the Union Pacific Railroad as a joint venturer and ultimately obtaining ICC approval for a new line connecting North Western's tracks with those of the Union Pacific. *Chicago & N.W. Transp. Co.*, 363 I.C.C. 906 (1981) [hereinafter cited as *1981 Decision*], *aff'd sub nom.* Mobil Oil Corp. v. ICC, 685 F.2d 624 (D.C. Cir. 1982).

theless, on May 21, 1982, the Commission issued a show-cause order directing BN to state a "buy-in" price and to explain in detail the methodology used to compute the price. App. at 53a. In response, BN reiterated its long-standing position that the Commission had no authority to compel the sale of the rail line on terms and conditions of the Commission's choosing. However, to demonstrate its good faith, BN submitted a detailed proposal for an appropriate operating agreement and for sale of a one-half interest in the line for $95.5 million, a price calculated by BN's independent financial advisers, Morgan, Stanley & Co., Inc.

If at this point the Commission had believed that BN's asking terms and operating agreement were so unreasonable that they effectively excluded North Western from the project, the Commission could have instituted a proceeding to determine whether BN was operating in violation of the 1976 certificate. *See* 49 U.S.C. § 11701(a) (Supp. V 1981). The Commission had previously announced that this was exactly the tack it intended to take should circumstances so require. *See 1981 Decision*, 363 I.C.C. at 920 n.13. Exercise of this express statutory power would have entitled BN to a formal hearing. 49 U.S.C. § 11701(a) (Supp. V 1981). More important, the focus of the hearing would have been whether BN was negotiating in good faith. There would have been no presumption that BN was obligated to reach agreement with North Western, only an assurance that BN could not exclude North Western by insisting upon terms of sale that were unrealistic or unreasonable.

Instead of pursuing this well-marked course, the Commission proceeded to create a new form of administrative proceeding, without precedent or statutory sanction. First, in apparent recognition of its lack of prescription authority, the ICC asked each party to submit to binding arbitration by the Commission. App. at 42a. BN declined, but did submit a "final best offer" that paralleled

its earlier offer of $95.5 million. *See* App. at 14a. North Western's "final best offer" for purposes of binding arbitration was $83 million; otherwise it offered $60 million. *See* App. at 14a.

Based solely on these conflicting offers and the written evidence underlying them, on October 22, 1982 the ICC issued the order under review. App. at 30a [hereinafter cited as *October 1982 Decision*].[5] In that order, the Commission required BN to sell a one-half interest in a defined segment of the Powder River Basin line to North Western for $76.2 million. *October 1982 Decision* at 6, App. at 19a. The Commission also prescribed the terms of an operating agreement between the parties, requiring among other things that BN bear all of the labor protection costs caused by North Western's belated entry. *October 1982 Decision* at 11, App. at 27a-28a. On BN's petition for review, the United States Court of Appeals for the District of Columbia Circuit issued a one-page judgment, without opinion, affirming the Commission's decision. App. at 1a. A timely petition for rehearing and suggestion for rehearing en banc was denied on June 21, 1983, with a three-page memorandum opinion from the panel explaining its original judgment. App. at 5a.

The panel opinion on rehearing reflected a fundamental misreading of the *1976 Decision* and its consequences. The opinion correctly noted that BN and North Western were granted joint authorization and that North Western "did not . . . meet its financial obligations, repeatedly failing to tender its share of the construction costs." App. at 5a. It then implied, however, that BN was obligated to "notify[] the Commission of the changed conditions and request[] that it be made sole owner and operator of the line" before it could implement the authority it had been

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[5] Subsequently, on November 3, 1982, the Commission issued a further order clarifying its *October 1982 Decision*. *See* App. at 8a to 10a.

granted. App. at 5a. The panel cited no authority and nothing in the *1976 Decision* for this proposition.

Based upon its misreading of the *1976 Decision*, the panel advanced three bases for the Commission's authority to prescribe the price and terms for the sale to North Western. First, the panel said, the Commission has the power under 49 U.S.C. § 10901 to require applicants to comply with "conditions the Commission finds necessary," and this power permits the Commission to enforce the alleged condition in the 1976 certificate that BN's authority could only be exercised jointly. App. at 6a. Second, the court said, the *1976 Decision* "necessarily required" the carriers to agree to a joint ownership and operating agreement which the Commission is empowered under 49 U.S.C. §§ 11343 and 11344 to approve and upon which it may impose conditions. App. at 6a. Third, the panel said, the Commission has "implied power to prescribe particular terms and conditions necessary to the public interest in the course of exercising its explicit statutory authority." App. at 6a. On these grounds, and based upon the "unusual circumstances of this case," the court upheld the Commission's unprecedented action of prescribing the price and contractual terms of the sale. The court did not address the issue of the Commission's arbitrary exercise of its asserted authority, except to say in conclusory terms that the price prescribed was "fair." App. at 6a.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Effectively Grants the ICC Unprecedented Implied Authority Over Private Rail Carrier Transactions

The court below committed a fundamental legal error by interpreting the *1976 Decision* of the ICC as though it had included a condition that BN could exercise the granted authority only in concert with North Western. The simple fact is that the *1976 Decision* neither contained nor implied any such condition. In the absence

of such a condition, the ICC's order of October 22, 1982 can only be sustained as the exercise of an expansive implied power either (1) to alter the terms of carrier authority *after* a carrier has exercised the authority in good faith or (2) to compel a carrier to sell a partial interest in an operating rail line to another carrier at a prescribed price and on prescribed terms. The decisions of this and other Courts indicate that the ICC possesses neither power.

This case is particularly appropriate for Supreme Court review because the court of appeals decision upholding the Commission's authority is so clearly based on a fundamental misconception of the Commission's action. As recounted above, the *1976 Decision* was entirely permissive; it authorized, but did not require, joint ownership and operation.[6] The Commission's goals—environmental protection and safeguarding the financial well-being of North Western—were both met completely so long as only one rail line was built.[7] The Commission's explicit

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[6] It is well established that the ICC cannot compel an unwilling party to begin exercising rail carrier authority. *See* ICC v. Oregon-Washington R.R. & Nav. Co., 288 U.S. 14, 37 (1933); Industrial Comm'n v. New Jersey & N.Y.R.R., 324 I.C.C. 272, 273-74 (1965). Obviously, therefore, the Commission could not have intended its *1976 Decision* to mandate that both parties actually engage in the service authorized.

[7] The Commission's revisionist assertion that the need for "competition" dictates the presence of two carriers cannot be given credence. As stated earlier, the *1976 Decision* did *not* posit a competitive need as the basis for the issuance of joint permissive authority and the evidence of record does not address competitive issues. Moreover, in Union Pac. Corp., 366 I.C.C. 459 (1982), *petition for review filed sub nom.* Southern Pacific Transportation Co. v. ICC, No. 82-2253 (D.C. Cir. Oct. 20, 1982) [hereinafter cited as *Pacific Rail Merger Case*], the ICC clearly held that transportation competition *could not* arise in the circumstances here involved. The ICC's analysis of competition in that case is wholly irreconcilable with its belated and disingenuous advancement of a competition rationale here.

reservation of power to review North Western's financing plans is inconsistent with the premise that the Commission necessarily contemplated dual operations. Neither the Commission nor the court of appeals cited anything in the *1976 Decision* to the contrary.

It was thus simply wrong for the court below to state in its opinion on rehearing, without citation, that "BN and CNW could not by themselves change this joint authority into sole authority for one or the other through contract, or the failure to perform under a contract." App. at 7a. Had North Western been unable to obtain Commission approval of its financing, or had it chosen to invest its limited funds in other projects, the Commission had no power to force North Western to participate in the Powder River Basin project. BN would obviously have been free to go forward in such circumstances; the public interest in rail service to the southern Powder River Basin could not have been contingent upon North Western's financial stability. The lower court's basic premise—that prescription was required to effectuate the *1976 Decision*—is thus fundamentally in error.

Had the ICC conditioned BN's original acceptance of the operating certificate on BN's agreement to abide by any future Commission prescription orders, BN would have had a fair opportunity to consider whether exercise of the authority was worth the price. If BN had exercised its authority on this basis, it would today have no argument against the ICC's prescription power. The only condition implicit in the certificate, however, was that BN could not prevent North Western from operating on the joint line by refusing to negotiate in good faith about the terms of operation. *See, e.g., Chicago, Milwaukee, St. Paul & Pacific Railroad*, 342 I.C.C. 578, 593 (1973). For violation of this condition, the ICC had express statutory power to seek fines, injunctions, or other penalties. *See* 49 U.S.C. §§ 11701, 11702, 11703, 11901 (Supp. V 1981). Had the Commission chosen to follow this course, it would

have been required to afford BN a full hearing, *see* 49 U.S.C. § 11701(a) (Supp. V 1981), or to proceed in a federal district court, where the complete panoply of procedural safegaurds would have been available. *E.g.*, 49 U.S.C. § 11702 (Supp. V 1981).[8]

In short, this is not a case in which implied agency power is necessary to preserve or effectuate an express statutory power. Contrary to the court of appeals' opinion, the Commission's power to enforce conditions on grants of operating authority pursuant to 49 U.S.C. § 10901 is not at issue in this case at all, for the simple reason that the Commission never imposed the asserted condition in its *1976 Decision*. Nor is the Commission's authority to approve carrier-made operating agreements involved here, since the Commission did not have before it an agreement to which both carriers had acceded. It is well settled that the power to review agreements reached by carriers does not carry with it the power to prescribe them. *St. Joe Paper Co. v. Atlantic Coast Line Railroad*, 347 U.S. 298, 305-06 (1954).

In these circumstances, the ICC's decision must be seen as either (1) the retroactive imposition of a condition on BN's exercise of its construction and operating authority or (2) the exercise of a virtually limitless power to compel the sale of rail carrier property merely to satisfy current Commission policy goals. In either case, the result is plainly inconsistent with this Court's past decisions.

As to the first ground, the conditions on which a regulated company exercises authority granted to it by an administrative agency are binding on both the company and the agency. Agencies have no inherent authority to alter

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[8] Moreover, the focus of such a hearing would have been the good faith of BN's asking terms. BN believes it is manifest these terms would have been found to be a commercially reasonable, good faith offer. Indeed, this is the likely outcome on remand if the Commission's existing order is vacated.

those conditions after the fact. *See, e.g., Norfolk & Western Railway v. ICC*, 619 F.2d 1033, 1040-41 (4th Cir. 1980). As this Court has observed, "supervising agencies desiring to change existing certificates must follow the procedures 'specifically authorized' by Congress and cannot rely on their own notions of implied powers in the enabling act." *Civil Aeronautics Board v. Delta Air Lines*, 367 U.S. 316, 334 (1961) (*citing United States v. Seatrain Lines*, 329 U.S. 424 (1947)). The ICC has no express statutory authority to modify certificates issued under 49 U.S.C. § 10901, and it retained no authority to do so in the *1976 Decision*. Thus, any attempt by the ICC to rewrite its prior decision after the fact must be rejected.

The sole remaining ground of the Commission's and the court of appeals' position is the assertion that the ICC has the implied power to impose a buy-in price and the terms of an operating agreement because the Commission *now* believes that joint operation is a desirable goal that can be most expeditiously obtained by the exercise of direct prescription power.

This position is directly in conflict with the decisions of this Court and other courts on the implication of administrative authority. The cases relied upon by the court of appeals are illustrative. In *United States v. Chesapeake & Ohio Railway*, 426 U.S. 500 (1976), the ICC exercised its power to impose express conditions on the granting of a rate increase without suspension. As the Court noted, the carriers in *Chessie* were "not required to submit a tariff imposing such a condition . . . . They had the option to continue to insist on an unconditional increase . . . ." *Id.* at 515. Thus, *Chessie* was not a case where the ICC asserted an implied power to impose a condition retroactively, without fair notice to the carrier affected.

Even more pointed is *Thompson v. Texas Mexican Railway*, 328 U.S. 134 (1946). There the Commission exer-

cised an implied prescription power in order to prevent an unlawful abandonment of service by one of two carriers involved in a trackage rights agreement that had expired by its own terms. *Thompson* indicates that new powers should be implied for agencies only where they are *essential* to preserve the agency's statutory jurisdiction. The same principle is embodied in *American Trucking Association v. United States*, 344 U.S. 298 (1953). As the Fifth Circuit recently observed, the rules under review in *ATA* were upheld only because they were "necessary to preserve the express statutory mandates of the Act." *Central Forwarding, Inc. v. ICC*, 698 F.2d 1266, 1276 (5th Cir. 1983).

Because the decision here goes well beyond the bounds of these guiding precedents, sanctioning an implied power that is both unnecessary and open-ended, it should be overturned. Permitting administrative agencies to compel the sale of regulated property on a prescribed basis, without statutory authority, would have pernicious consequences. As in this case, agency-created procedures may well lead to unfair results, depriving a regulated carrier of its property without adequate compensation. Moreover, the governing policy of the Interstate Commerce Act, which encourages voluntary transactions between carriers, *see St. Joe Paper Co. v. Atlantic Coast Line Railroad*, 347 U.S. 298, 305-06 (1954), would be thwarted by wholesale allowance of such an implied power. Finally, such a power would render express provisions of the Act, such as the Commission's power to impose conditions on initial grants of authority, *see* 49 U.S.C. § 10901 (Supp. V 1981), redundant and unnecessary. *Cf. Hirschey v. FERC*, 701 F.2d 215, 218 (D.C. Cir. 1983).[9]

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[9] Such an implied power would also render superfluous the many explicit provisions of the Interstate Commerce Act, as amended, that grant the ICC authority, in carefully limited circumstances, to prescribe an agreement where the carriers involved are unable to reach one. *See, e.g.*, 49 U.S.C. §§ 11123, 11103, 10901(d) (Supp. V 1981). Congress plainly knows how to grant the kind of power

The court below has thus strayed far from the guiding principles this Court has established for implying non-statutory agency powers. The broad implications of this decision will not be lost on those who practice before the Interstate Commerce Commission, despite the court of appeals' failure to publish a full opinion explaining its decision in this significant case. This Court should grant the writ of certiorari to correct the court of appeals' sharp departure from settled principles and to prevent this unwarranted extension of bureaucratic authority over private rail carriers.

II. The Decision Below Misapplied the "Arbitrary and Capricious" Standard of Agency Review by Sanctioning an ICC Decision Which, Without Reasonable Explanation, Deprived Petitioner of Adequate Compensation for Its Property

Under the Administrative Procedure Act, a reviewing court must "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, [or] an abuse of discretion." 5 U.S.C. § 706(2) (1976). In reviewing an agency decision under the arbitrary or capricious standard, the court "must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971). As this Court stated in *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*, 103 S. Ct. 2856 (1983), decided only last Term, a court applying this standard must do more than ensure that the challenged action meets the "minimum rationality" test applied to statutes under the due process clause. *Id.* at 2866 n.9.

Here, the court of appeals appears to have done far less. In its initial judgment, the court stated only that its

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asserted by the ICC here, but chose not to give the ICC broad license to exercise such power.

"review of the Commission's prescribed terms is so limited (citation omitted) [that] we cannot say that the Commission's order should be vacated." App. at 2a. In its June 21, 1983 opinion on rehearing, the panel was equally terse, stating that the price prescribed by the ICC "fully compensated BN for the cost of construction less depreciation and the risks of its investment during the interim when CNW was in default." App. at 6a. A careful analysis by the court of appeals would have shown, however, that the Commission's prescribed price not only fell far short of fully compensating BN for its property, but also was devoid of rational explanation. Moreover, even a casual examination of the Commission's justification for its action—an assertion that the North Western's presence is dictated by competitive need—would have revealed that this rationale was adopted without the development of an adequate record or substantial evidence and further that this rationale is flatly contradictory to the Commission's analysis of transportation competition between the same carriers in a decision issued within two days of the *October 1982 Decision*. *See Pacific Rail Merger Case*, 366 I.C.C. at 535-42; *see also* note 7 *supra*.

A. The Commission's Buy-In Price Methodology Undercompensated BN for the Risk Involved

At the time of the Commission's *1976 Decision*, BN and North Western had agreed to share equally in the costs of constructing the Powder River Basin line. If North Western had made its capital contributions as originally agreed, it, like BN, would have borne a share of the substantial risks the venture entailed, and would have paid competitive, market rates for the capital invested. Instead, North Western chose to sit on the sidelines while BN built the line and pioneered unit train coal service in the Powder River Basin. North Western then demanded to re-enter the project only when financial success was in sight.

The Commission consistently recognized that it would be inequitable under these circumstances to require BN to transfer an undivided one-half interest in the line on the same terms that had been available to North Western prior to its defaults. As the Commission stated in its *1981 Decision*, for example, "CNW's financial obligation to BN includes the payment of interest on CNW's share of the project costs, plus any damages incurred by BN as a result of CNW's delay past the agreed-upon date in tendering its share of those costs to BN." 363 I.C.C. at 920.

Despite prolonged, good-faith negotiations by the parties, the issue of the appropriate payment to be made by North Western had not been resolved by the time of the *October 1982 Decision*. The Commission thus took upon itself the task of calculating a buy-in price. The central element in this process was determining how to adjust the historical cost of building the line to reflect the present value of the line, in light of the risks endured by BN during construction.[10] BN proposed a project cost

[10] Another key element, the depreciation adjustment, was perhaps the most glaring example of the Commission's inability to justify its approach to formulating a prescribed price. The Commission deducted from the "buy-in" price an amount of $5.1 million attributed to "depreciation". *October 1982 Decision* at 9, App. at 25a. This deduction was not only $1 million *more* than North Western had requested, but was also devoid of meaningful explanation. The Commission mentioned "wear and tear" on the line as a possible justification, but failed to discuss the provision in the operating agreement—also prescribed by the Commission—that requires BN to replace worn-out portions of the track during the first five years of joint operation. The Commission's $5.1 million "depreciation" deduction thus results in obvious double-counting. Moreover, the alternative rationale advanced on appeal—that the $5.1 million represents a "return of capital" that BN supposedly has received from its customers—was *expressly* rejected in the October 22 decision. "CNW . . . contends that BN's compensation should be reduced because it has already received a return on capital from its ratepayers", the Commission stated. "We must reject this argument . . . ." *October 1982 Decision* at 7, App. at 20a.

of capital approach that would measure the specific cost of the risks North Western avoided due to its defaults. The Commission, however, chose to apply a much lower 14 percent "corporate cost of capital" rate, representing the weighted average cost of capital to BN as a whole. "This standard," the Commission concluded, "compensates BN for its risk of expending funds which were required when CNW did not tender its share of the construction costs as they were incurred." *October 1982 Decision* at 8, App. at 23a.

As BN demonstrated in its submission to the Commission, this conclusion is simply wrong. BN's overall cost of capital reflects the economic prospects and risk factors associated with *all* of its operations. The ability of BN to raise capital in the financial markets at desirable rates is a valuable asset of the company, built up over many years and properly accruing to the benefit of BN's stockholders.[11] Under the Commission's approach, this asset would be turned to the direct benefit of North Western, in effect, giving it a subsidy at BN's expense.

B. The Commission Failed to Explain Its Cost of Capital Assumptions in a Rational Manner

The Commission attempted to avoid the implications of BN's project cost of capital argument by making a key assumption, namely, that BN's risks on the Powder River Basin project were exactly the same as its overall corporate risks. The Commission's primary assertion was

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[11] BN's creditworthiness is just as much a corporate asset as tax benefits, which the Commission properly recognized should not be used to offset North Western's liability. *See October 1982 Decision* at 9-10, App. at 25a. As the Commission observed in that context: "[W]e do not regard CNW's argument that the BN will be able to defer payment of the tax as having any bearing on the issue because any investment tax [credit] carry-forward is the property of BN's shareholders and should not inure to the benefit of the CNW." *Id.* at 10, App. at 25a. The Commission gave no explanation for its inconsistent treatment of the tax issue and the cost of capital issue.

that the risks BN faced in the Powder River Basin—"uncertain coal market, potential slurry competition, nuclear energy competition, and regulatory uncertainty"—were "identical" to the risks BN faced on all its coal-related investments. *October 1982 Decision* at 8, App. at 23a. The Commission paid too little regard, however, to the most important and specific risks relating to the Powder River Basin project.

First, unlike BN's other coal-related rail maintenance and upgrading efforts, the Powder River Basin project involved construction of an entirely new rail line. It could not begin to generate substantial revenues until the entire line was completed and unit trains began running south from the Powder River Basin mines. *See October 1982 Decision* at 7, App. at 20a.

Second, this project was planned and developed to meet new or projected market demand for the low-sulfur coal found in the Powder River Basin. At the time the project plan was formulated, the mines that would produce the coal were only in the developmental stage, and many of the power plants which would burn it were still on the drawing board. In essence, the entire project was contingent on future events whose occurrence was highly uncertain. The Commission's unsupported assumption that the additional elements of risk peculiar to the Powder River Basin project were "the identical risks BN faced on most of its investments at the time," *October 1982 Decision* at 8, App at 23a, was thus completely arbitrary and contrary to any reasonable judgment about the project's status.

The Commission's other principal argument in favor of its equal risk assumption was that BN's investment in the Powder River Basin project remained relatively low until 1976, by which time the project's risks had diminished substantially. *October 1982 Decision* at 9, App. at 24a.

North Western, however, balked at entering this supposedly "risk-free" enterprise throughout the period from 1976 through 1979. In fact, in November, 1975, only a few weeks before the Commission estimates that all the special risks of this project had disappeared, North Western took a much different view of the risk of the venture. In a letter to the Commission's Deputy Director of Finance, Louis T. Duerinck, then General Solicitor for North Western, stated:

> Over the past year we have witnessed numerous events—such as Congressional and Presidential friction over surface mining legislation, the issuance by a federal court of an injunction restraining the Department of the Interior from issuing any right of way permits for transportation of coal from the Powder River Basin, massive lobbying by coal slurry pipelines to obtain special privileges encouraging the construction of such lines from points in the Powder River Basin to destinations throughout the United States, and the temporary abatement of mining development by at least two companies in the Powder River Basin area. These factors have, of course, served to set back by several years the development of the basin.[12]

Mr. Duerinck went on to say that there was no way North Western could predict when construction might begin or when "the ground rules will finally become known for the surface mining of coal in this region." As a result, he said, "there is no way that anticipated earnings can be projected until such time as more is known about timing and extrinsic events than is presently known."

The Commission, in short, failed to provide any reasoned basis for assuming that BN incurred risks on the Powder River Basin project identical to those embodied in

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[12] This letter was part of the record below, and was reprinted in the Joint Appendix in the court of appeals at pp. 294-96.

its overall corporate cost of capital. These project-specific risks in fact were shown to be much larger than BN's average corporate risk. BN's independent financial advisers, Morgan, Stanley & Co., Inc., estimated that it would have required a premium to equity investors of 8 percent above BN's 17 percent weighted average cost of equity during this period to attract financing to the project. *See October 1982 Decision* at 7, App. at 21a. The Commission, however, made no attempt to determine the appropriate *project* cost of capital. Because of this serious flaw in its methodology, the Commission's decision was arbitrary and capricious.[13]

The court of appeals, far from subjecting the Commission's decision to careful scrutiny, referred to its "review of the Commission's prescribed terms" as "so limited . . . we cannot say that the Commission's order should be vacated." App. at 2a. This constricted approach to judicial review is unacceptable. The statutory directive that agency action be tested under the "arbitrary and capricious" standard should not be undermined by an unduly narrow view of the court's function. Here, had the court of appeals properly applied the Administrative Procedure Act, it undoubtedly would have found the agency's prescription order invalid. Accordingly, even if the Commission were found to have implied prescription authority, this case should be remanded to the lower court for further consideration under a proper standard of review.

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[13] In addition, the Commission erred in prescribing an agreement that requires BN, over its objections, to bear all the labor protective costs occasioned by North Western's belated entry into the project. *October 1982 Decision* at 11, App. at 27a-28a. This inequitable action causes BN, the innocent party in this transaction, to bear expenses that ought properly to be the responsibility of North Western, whose defaults were the source of these prospective losses. *See, e.g.*, National Safe Deposit, Sav. & Trust Co. v. Hibbs, 229 U.S. 391, 394 (1913).

C. The Commission's Prescription Order Was Based on a Competition Rationale Which Was Not Supported by Substantial Evidence and Which the Agency Itself Had Rejected in a Decision Issued Only Two Days Before

As described above, the rationale for the Commission's issuance of the 1976 certificate for the construction of a single Powder River Basin line was to minimize the financial and environmental impacts of building parallel lines. At no time in those early proceedings or in its *1976 Decision* did the Commission posit competition as an issue to be addressed or as the basis for issuance of the joint permissive authority. Not surprisingly, the evidence developed did not address a perceived need for competition but rather was oriented to financial, operating, service and environmental issues. *See 1976 Decision*, 348 I.C.C. at 390-99, App. at 59a-71a. It was only after the fact, and with absolutely no effort to adduce evidence on whether two carriers were desirable in the Powder River Basin for competitive reasons,[14] that the Commission embraced competitive need as the ultimate justification for authority to prescribe terms of a forced partnership between BN and North Western. *See October 1982 Decision* at 4-5, App. at 16a-17a.

Underscoring the arbitrariness of the Commission's competition theory here is its analysis of transportation competition in the *Pacific Rail Merger Case*, 366 I.C.C. 459 (1982), a case decided a mere 48 hours before the *October 1982 Decision* here under review. In the *Pacific Rail Merger Case*, BN adopted the Commission's assumption that competition for the movement of Powder River

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[14] To the contrary, in the parallel *Pacific Rail Merger Case*, the Commission repeatedly *rebuffed* efforts by BN to develop a record bearing on competition issues and denied it meaningful discovery designed to obtain evidence on the extent to which competition was needed or would in fact take place. *E.g.*, BN's Request for Access to Certain Information, Union Pacific Corp., Finance Docket No. 30,000 (unpublished) (decision served March 9, 1981).

Basin coal was desirable, and showed how the Union Pacific-Missouri Pacific merger would, if approved, destroy the very competition the Commission was seeking to create in this case. BN analyzed the utilities served exclusively by Missouri Pacific, which overlap with utility plants the Commission belatedly asserted in the *1981 Decision* would enjoy the benefits of competition between BN and North Western. BN demonstrated how, under the Commission's theory and in the absence of a Union Pacific-Missouri Pacific merger, Missouri Pacific would be a neutral connection for coal originated by North Western or BN.[15] However, BN also showed how, once Missouri Pacific was controlled by Union Pacific, it would favor its new parent over BN and deny BN the independent access to utilities that BN needed to compete. In this fashion, the very competition which the Commission professes to embrace would be destroyed. *See Lamoille Valley Railroad v. ICC*, 711 F.2d 295 (D.C. Cir. 1983); *Transkentucky Transportation Railroad v. Louisville & Nashville Railroad*, ——F. Supp. ——, 1983-2 Trade Cas. (CCH) ¶ 65,476 (E.D. Ken. June 28, 1983). Astonishingly, the Commission rejected BN's analysis in the *Pacific Rail Merger Case* and concluded that competition between origin carriers such as BN and North Western could *not* take place unless each also *directly* served the utility plant. In light of the Commission's contemporaneous advancement of "competition" as the *raison d'etre* for its *October 1982 Decision*, this holding is completely in-

[15] In the so-called Connector Line case (the *1981 Decision*), the Commission assumed that utilities served by more than one carrier and utilities served by a single carrier unaffiliated with BN, North Western or Union Pacific would be "competitive" to BN and North Western. In contrast, utility plants served exclusively by BN, North Western or Union Pacific were assumed by the Commission not to represent "competitive" traffic to the alternative originating carriers. This follows because an originating carrier not having independent access to a destination, either directly or by interlining with a disinterested third party, would have to rely on the willingness of its competition to compete with itself—an unlikely prospect.

explicable, particularly since *only one* of the dozens of utility plants for which the Commission had data is directly served by BN and North Western.

It is abundantly clear that these two decisions cannot be reconciled. At a minimum, even if the court were to conclude that the Commission had statutory authority to act as it did, this case should be remanded to the Commission with instructions to develop an adequate record on the question of competition in light of the lack of existing evidence in this case and the agency's flatly contradictory reasoning in the *Pacific Rail Merger Case*. The *October 1982 Decision* cannot stand on the quicksilver foundation offered by the agency.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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September 19, 1983

83-468
No. ———

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

[No Opinion]

No. 82-2341

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Respondents

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY *et al.*,
Intervenors

Petition for Review of a Decision of the
Interstate Commerce Commission

[Filed Mar. 29, 1983]

Before WRIGHT and WALD, Circuit Judges, and BONSAL,* Senior District Judge.

JUDGMENT

This cause came on to be heard on a petition for review of a decision of the Interstate Commerce Commission and

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* Of the United States District Court for the Southern District of New York, sitting by designation pursuant to 28 U.S.C. § 294(d) (1976).

was briefed and argued by counsel. The issues presented have been fully considered by the court; they occasion no need for an opinion. *See* D.C. Cir. Rule 13(c).

Since the Commission's authority is not restricted to its express statutory powers, *see American Trucking Ass'ns v. United States*, 344 U.S. 298, 309-310 (1953); *Thompson v. Texas Mexican R. Co.*, 328 U.S. 134, 149 (1946), and since this court's review of the Commission's prescribed terms is so limited, *see Permian Basin Area Rate Cases*, 390 U.S. 747, 766-767 (1968), we cannot say that the Commission's order should be vacated. *See also Global Van Lines, Inc. v. ICC*, 627 F.2d 546, 550-552 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 1079 (1981).

On consideration of the foregoing, it is ORDERED and ADJUDGED by this court that the decision of the Interstate Commerce Commission sought to be reviewed herein is hereby affirmed.

It is FURTHER ORDERED by this court, *sua sponte*, that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 14, as amended November 30, 1981 and June 15, 1982.

Bills of costs must be filed within 14 days after Per Curiam entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

No. 82-2341

BURLINGTON NORTHERN RAILROAD COMPANY
Petitioner

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION
Respondents

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY *et al.*
Intervenor

[Filed Jun 21, 1983]

Before: ROBINSON, Chief Judge; WRIGHT, TAMM, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG, BORK and SCALIA, Circuit Judges

ORDER

Petitioner's suggestion for rehearing *en banc* has been transmitted to the full Court and no member of the Court has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

FOR THE COURT:
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

Circuit Judge Edwards did not participate in this Order.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

No. 82-2341

BURLINGTON NORTHERN RAILROAD COMPANY
Petitioner

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION
Respondents

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY *et al.*,
Intervenor

[Filed Jun 21, 1983]

Before: WRIGHT and WALD, Circuit Judges and BONSAL,* Senior District Judge, U.S. District Court for the Southern District of New York

ORDER

On consideration of Petitioner's petition for rehearing, it is

ORDERED by the Court that the aforesaid petition is denied for the reasons set forth in the attached memorandum.

FOR THE COURT:
GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

---

* Sitting by designation pursuant to Title 28 U.S.C. § 294(d).

In our judgment, the result reached by the Interstate Commerce Commission is justified by the peculiar course of events in this case. We therefore deny Burlington Northern Railroad Company's (BN) petition for rehearing.

Confronted with separate applications from BN and from Chicago and North Western Transportation Company (CNW) to construct parallel rail lines in the coal-rich Powder River Basin area of Wyoming, the Commission, concerned with environmental impact and the overall ability of both carriers to sustain service, caused the railroads to consolidate their proposals into a single application for a joint line. In 1976 the Commission issued its certificate authorizing the two rail carriers *jointly* to construct and operate a single rail line. BN and CNW negotiated an agreement by which each would share equally in construction costs and would own a one-half share of the facilities. CNW did not, however, meet its financial obligations, repeatedly failing to tender its share of the construction costs. Instead of notifying the Commission of the changed conditions and requesting that it be made sole owner and operator of the line, BN undertook unilaterally to implement the joint authority that had been granted to both railroads. By 1979, BN had completed construction and begun single-carrier operations.

When the prospects for coal development in the Powder River Basin dramatically improved, CNW advised BN and the Commission of its improved financial condition and that it wished to re-enter the project. After BN opposed CNW's re-entry, the Commission issued its own interpretation of, and instructions with reference to, the original 1976 joint certificate. The Commission directed that BN establish a "buy-in" price for the sale of a one-half interest in the line and that the parties arrive at a voluntary agreement on ownership and operation of the line. When the parties failed to agree, the Commission

itself prescribed the terms of their joint participation in the line, setting a fair price for CNW's one-half interest—a price that fully compensated BN for the cost of construction less depreciation and the risks of its investment during the interim when CNW was in default.

By prescribing the terms of this joint participation, the Commission sought to preserve the integrity of its 1976 decision authorizing the two railroads jointly to construct and operate a single rail line. Its power to do so is based on three related elements. First, 49 U.S.C. § 10,901 gives the Commission both the power to authorize the construction and operation of railroad lines and the authority to "approve [an] application with modifications and [to] require compliance with conditions the Commission finds necessary in the public interest." *Id.* § 10,901(c)(1)(A)(ii). In this case, the Commission clearly stated in its 1976 decision, and restated in subsequent proceedings, that it acted in the public interest by granting an application for joint ownership and operation instead of applications for separate lines. Second, the Commission's 1976 decision permitting joint action by BN and CNW necessarily required the two railroads to enter into agreements on construction and operation of the new line. The Commission has the authority to approve such joint ownership and operating agreements and can impose conditions on them to further the public interest. *See id.* §§ 11,343(a)(6), 11,344(c). Third, numerous cases recognize the Commission's implied power to prescribe particular terms and conditions necessary to the public interest in the course of exercising its explicit statutory authority. *See, e.g., United States* v. *Chesapeake & Ohio Railway*, 426 U.S. 500, 514 (1976); *Thompson* v. *Texas Mexican Railway*, 328 U.S. 134, 144-50 (1946); *Global Van Lines, Inc.* v. *ICC*, 627 F.2d 546, 550 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 1079 (1981). Indeed, Congress has created regulatory agencies and delegated general powers to them in part because it believes specialized bodies can achieve Congress' objectives by tailoring appropriate responses to

fit particular problems. *See American Trucking Associations* v. *United States*, 344 U.S. 298, 309-11 (1953).

Under the unusual circumstances of this case, we see no basis for interfering with the Commission's task of overseeing the implementation of its certificate for a jointly owned and operated rail line in the Powder River Basin. BN knew that it was proceeding under a grant of joint authority when it went forward with the construction and operation of the new line. It did so voluntarily. BN cannot now complain that the Commission changed the ground rules by forcing it to share the line with CNW because from the first the Commission made it clear that BN and CNW were to act together. BN and CNW could not by themselves change this joint authority into sole authority for one or the other through contract, or the failure to perform under a contract. Particularly given the limited scope of our review of Commission action, *see Permian Basin Area Rate Cases*, 390 U.S. 747, 766-767 (1968), we cannot say that the Commission acted arbitrarily, capriciously, or otherwise illegally in directing the resolution of this problem presented to it by the two railroads.

Service Date: Nov. 3, 1982

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 29066 *

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY APPROVAL OF TERMS OF CONSTRUCTION, OWNERSHIP AND OPERATION OF A LINE OF RAILROAD IN CAMPBELL AND CONVERSE COUNTIES, WYOMING

Decided: October 29, 1982

By decision served October 22, 1982, we prescribed the price to be paid to Burlington Northern Railroad Company (BN) by Chicago and North Western Transportation Company (CNW) and its wholly-owned subsidiary, Western Railroad Properties, Incorporated (WRPI), for an undivided one-half interest in the line of railroad in the Powder River Basin of Wyoming extending from Coal Creek Junction on the north to Shawnee Junction on the south. We also prescribed the terms of a joint line agreement between BN and CNW. We required CNW to demonstrate by November 5, 1982 that it is willing and able to tender the prescribed purchase price and we required

* The decision embraces F.D. No. 28934, Chicago and North Western Transportation Company Construction and Operation of a Line of Railroad in Niobrara and Goshen Counties, Wyoming and in Sioux and Scotts Bluff Counties, Nebraska, F.D. No. 29332, Application of Western Railroad Properties, Incorporated for Approval of Trackage Rights Over Track of Union Pacific Railroad Company Near Joyce, Nebraska, F.D. No. 29333, Western Railroad Properties, Incorporated Acquisition of Segment of Chicago and North Western Transportation Company's Line From Shawnee to Crandall, Wyoming, Including the Right to Operate the Line as a Common Carrier, and F.D. No. 29398 (Sub-No. 1), Application of Chicago and North Western Transportation Company under Section 11343 of the Interstate Commerce Act for Approval of its Operation of a Line of Railroad Between Coal Creek Junction, Wyoming, and South Morrill, Nebraska pursuant to an agreement with its subsidiary, Western Railroad Properties, Incorporated.

BN, immediately thereafter, to indicate whether it is willing to accept a tender in the amount and on the terms we prescribed. Finally, we required CNW, if BN indicates its willingness to accept the prescribed price and terms, to make the actual tender within 15 days after BN so indicates.

Earlier, in the *Connector Line* case,[1] we had provided that the authority granted in this and certain related proceedings would expire unless North Western tendered its share of joint line costs by August 23, 1982 and also would expire to the extent not exercised by that date. In a decision served August 20, 1982 in the proceeding, we modified the pertinent ordering paragraphs of the *Connector Line* decision to provided that the various authorities would expire unless CNW made its tender and exercised the authorities by November 5, 1982.

In a letter dated October 28, 1982, CNW and WRPI state that the continued threat of expiration of the various authorities on November 5, 1982 is inconsistent with the terms of the decision served October 22, 1982. They request that the expiration provisions be modified to conform with the Commission's most recent decision, and they also suggest that a distinction be drawn between the date by which they must make the actual tender of funds and the date by which the various authorities relating to their coal line project must be exercised.

We have considered the request of CNW and WRPI. We find that the modifications to our prior decisions they propose are warranted and are consistent with the intent of our decision served October 22, 1982.

It is ordered:

1. Condition (c) of ordering paragraph (1) and ordering paragraph (7) of our decision served July 24, 1981

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[1] *Chicago N.W. Transp. Co.—Construction*, 363 I.C.C. 906 (1981), *aff'd sub nom. Mobil Oil Corporation v. I.C.C. and United States*, 685 F.2d 624 (D.C. Cir. 1982) (Nos. 81-2037 and 81-2038).

in the *Connector Line* case, 363 I.C.C. 906 (1981), are deleted.

2. Our decision served October 22, 1982 in this proceeding is amended by adding the following paragraphs immediately following ordering paragraph 3 and by renumbering existing paragraph 4 accordingly:

> 4. CNW must make the actual tender of funds within 15 days after BN indicates in writing its acceptance of the price and terms prescribed in this decision, or the authority granted to CNW by our decision served July 24, 1981 in the *Connector Line* case, 363 I.C.C. 906 (1981), and in Finance Docket No. 27579 shall expire.
>
> "5. If the authority of exemption granted by our decision served July 24, 1981 in the *Connector Line* case is not exercised within 60 days after the date when this decision is no longer subject to any administrative or judicial review proceedings, then that portion of the *Connector Line* decision pertaining to the unexercised authority shall no longer be effective."

3. This decision shall become effective on the date it is served.

By the Commission, Chairman Taylor, Vice Chairman Gilliam, Commissioners Sterrett, Andre, Simmons, and Gradison.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

Service Date: Oct. 22, 1982

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 29066

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY
APPROVAL OF TERMS OF CONSTRUCTION, OWNERSHIP AND
OPERATION OF A LINE OF RAILROAD IN CAMPBELL AND
CONVERSE COUNTIES, WYOMING

Decided: October 20, 1982

Background

Burlington Northern, Inc. (BN)[1] and the Chicago and North Western Transportation Company (CNW) filed a joint application to construct a line of railroad in Campbell and Converse Counties, WY on February 4, 1974. The purpose of the line was to enable both railroads to transport coal from the Powder River Basin. Joint construction was approved by us in *Burlington Northern, Inc.—Construction and Oper.*, 348 I.C.C. 388 (1976) (*1976 Decision*). At the same time the Commission dismissed individual applications which had previously been filed by both parties.

The joint line agreement of May 22, 1975, was the first attempt of the parties to set the terms under which they were to acquire the necessary land, provide materials, and construct and operate the project. All construction costs were to be shared equally. When CNW failed to pay for its share of the construction costs because it was unable to obtain funding, the deadline was subsequently extended, on June 1, 1976, to November 30, 1977, and later to November 30, 1979, by modifications to the original joint operating agreement. CNW still did not meet the deadline. In our decision in this proceeding served November 30,

[1] Now the Burlington Northern Railroad Company.

1979,[2] we responded to a petition by CNW asking us to extend the expiration date of the joint operating agreement. Although we declined to grant this specific relief, we noted our continuing jurisdiction over the operating agreement. We stated that: "Joint construction, ownership, and operation necessarily call for an agreement to govern their detailed functioning."

Until CNW filed its application in Finance Docket No. 29066 on June 13, 1979, neither the May 22, 1975 joint operating agreement nor the two supplemental agreements of June 1, 1976 and January 30, 1978, had ever been submitted to us by the parties for approval, even though the statute (49 U.S.C. 10901(a)(3)) explicitly requires that operating agreements be authorized by us. Further, the authority to approve a joint operating agreement governing the line was specifically reserved in our 1976 Decision. We said that the two carriers could not by private agreement in the absence of our approval convert the 1976 authorization for joint construction and operation into a single carrier project.[3] *1979 Decision*, p. 5.

In the *Connector Line*[4] case we continued to assert our jurisdiction over this matter. This decision, and the Ad-

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[2] Finance Docket No. 29066, *Application of Chicago and North Western Transportation Company for Approval of the Terms of Construction, Ownership and Operation of a Line of Railroad Presently Under Construction in Campbell and Converse Counties, Wyoming* (not printed), served November 30, 1979 *(1979 Decision)*.

[3] BN did, however, construct the line on its own and began operations in 1979 pursuant to agreements with CNW which we did not approve.

[4] CNW originally planned to upgrade 519 miles of its mainline track to handle unit train coal. When it became apparent that the cost of this project would be prohibitive it decided instead to construct a 56-mile long connector line. Authority to construct this line was granted by the Commission in the *Connector Line* case. *Chicago & N.W. Transp. Co.-Construction*, 363 I.C.C. 906 (1981) *(Connector Line)*. *Aff'd sub nom Mobil Oil Corporation, Petitioner v. I.C.C. and U.S.A.* 685 F.2d 624 (D.C. Cir. 1982) No. 81-2037 and 81-2038 *(Mobile)*.

ministrative Law Judge's initial decision in the same case, were the first to consider an operating agreement with regard to the line. By the time of our decision in the *Connector Line* case on July 24, 1981, however, the agreement had expired by its own terms. In addition, the Commission found that the agreement had certain provisions which were anti-competitive and ordered them struck.

In February of 1982, CNW filed a petition for us to order BN to show cause why the terms of a joint line agreement should not be prescribed. On May 21, 1982, we granted this petition and gave BN 50 days to provide evidence, and CNW 25 days to reply, concerning the total cost of construction of the completed line. We indicated that a fair buy-in price for an undivided one-half interest in the line would include CNW's share of the construction costs adjusted to reflect an appropriate interest rate, plus any damages incurred by BN due to CNW's failure to consummate the joint line agreement.

We indicated in our May 21, 1982 decision[5] that we would prescribe the buy-in price by August 23, 1982. But since the estimates submitted in response to our *May 1982 Decision* were so divergent, and there appeared to be progress in the negotiations, we gave the parties an additional 30 days to negotiate.[6] Also, in an effort to encourage meaningful bargaining, we ordered the parties to submit final best offers for the purpose of final offer arbitration if they could not agree to terms by September 22, 1982.

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[5] Finance Docket No. 29066, *Chicago and North Western Transportation Company Approval of Terms of Construction, Ownership and Operation of a Line of Railroad in Campbell and Converse Counties, Wyoming* (not printed), served May 21, 1982 *(May 1982 Decision)*.

[6] Finance Docket No. 29066, *Chicago and North Western Transportation Company Approval of Construction, Ownership and Operation of a Line of Railroad in Campbell and Converse Counties, Wyoming* (not printed), served August 20, 1982.

The parties have now submitted their final evidence with regard to a fair buy-in price.[7] BN, however, has not consented to final offer arbitration. Further, CNW indicates that while it is amenable to this process, we should not go forward with final offer arbitration unless BN agrees to be bound by it. Under these circumstances we conclude that final offer arbitration would be inappropriate for resolving this dispute. Thus we have no option but to prescribe a fair buy-in price.

Jurisdiction

Our jurisdiction to prescribe a contract is necessary to preserve the integrity of our *1976 Decision*[8] authorizing the construction and ownership of a single line over which both BN and CNW would operate. In that decision, we noted that the joint application was filed at the Commission's request to avoid the construction of two essentially parallel lines. As noted, both carriers had originally applied for authority to construct a line to provide access

[7] BN has proposed a price of $95.5 million. CNW has proposed a price of $83 million solely for the purposes of compulsory arbitration. As CNW notes, this price gives considerable value to an immediate settlement and avoidance of litigation. CNW submits a price of $60 million for purposes of prescription.

[8] As indicated in fn. 4, *supra*, the *Connector Line* decision was appealed by other parties and affirmed by the United States Court of Appeals for the District of Columbia Circuit. The existence of the joint line agreement was central to the Court's affirmance of the Commission's decision. The Court discussed at some length our determination in the *May 1982* decision to prescribe the terms of a joint line agreement if CNW and BN did not voluntarily negotiate terms. *Mobil, supra*, 636-7. The court then mentioned our repeated insistence since 1976 that the joint line be, in fact, jointly owned (*supra*, at 637). Our "commitment to insuring competition along the joint line" (id.) was given by the court as a principal ground for approving our decision to authorize construction of the connector line: "North Western's joint ownership and operation of the joint line form the linchpin for the public need for the connector line." Id. We believe that, under this decision, we have a continuing responsibility to foster joint ownership and operation of the joint line.

to the Powder River Basin. Separate lines, we found, "would result in wasteful and improvident expenditures for construction which are not necessary to insure adequate service, especially in view of the environmental and financial considerations involved." *Id.* at 399.

BN has consistently argued that we no longer have jurisdiction over the matter because its joint operating agreement with CNW has expired, and because CNW has not tendered the costs of construction as agreed. In the *Connector Line* case we rejected that argument as follows:

> Ordinarily, a carrier's failure to consummate a transaction within time limits to which it had agreed would render an application for approval of that transaction moot. However, the Joint Line Agreement presents an extremely unusual situation. That agreement is a necessary complement to our 1976 authorization of a joint, rather than a solely owned line. *Connector Line*, at 918.

BN did not appeal that decision.

Nevertheless, BN still argues that we lack jurisdiction to prescribe terms for the joint ownership of this line. Basically, BN now argues (1) that our explanation that prescription is necessary to promote competition is a *post hoc* rationalization; (2) that our certification authority under 49 U.S.C. 10901 is permissive only; and (3) that the precedent cited in our *May 1982* decision does not support an implied prescription power.[9] Contrary to BN, we

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[9] BN goes to great length to distinguish *Thompson v. Texas Mexican R. Co.*, 328 U.S. 134, 149 (1946), *Thompson*, which was cited in our *May 1982 Decision*. There the Commission prescribed the terms for a trackage rights agreement in order to prevent one railroad from precluding another from operating over its lines. The Brownsville and Mexico Railway Co. (Brownsville) was operating over the Texas-Mexican Railway Co. (Tex-Mex) under a trackage rights agreement. Tex-Mex attempted to invoke a termination clause in the trackage rights contract. The Court found that the Commission could prescribe terms for a continuing agreement be-

continue to conclude that we are vested with jurisdiction to prescribe a buy-in price and an agreement. We adopt the reasoning of our *1976 Decision*, *1979 Decision*, *Connector Line* and *May 1982 Decision*.

BN argues that because preservation of competition was not mentioned in our 1976 decision, it is a *post hoc* rationalization for preserving CNW's access to this coal traffic. BN is correct that joint line construction was encouraged and approved essentially to minimize environmental harm. However, competition was not a factor in 1976 because the Commission was faced with two alternatives, *both of which would include two origin carriers serving the basin*. As previously noted, both BN and CNW orignally contemplated constructing independent lines, and later agreed to file a joint application. The prospect that only a single carrier would serve the basin did not emerge until CNW had difficulties in obtaining funding and the parties could not agree on a revised operating agreement.

Our decision to certify construction of only a single line to be jointly operated from the Powder River Basin in no way diminishes the fact that it is extremely important to preserve the potential for *two competing* carriers to originate coal there. The Staggers Rail Act of 1980 (Staggers Act) included a new rail transportation policy, 49 U.S.C. 10101a, which indicates that we should allow "to the maximum extent possible, competition and the

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cause agreement was necessary to avoid an illegal abandonment. (A carrier cannot abandon its operations under a trackage rights agreement without our approval.)

BN argues that here CNW is authorized, not required, to operate over the Powder River Basin line, whereas Brownsville was required to operate over the line of Tex-Mex. This distinction is not crucial, because in both cases, the purpose of our prescription was to prevent an unwilling party (here BN, in *Thompson*, Tex-Mex) from frustrating our jurisdiction and the interests of the public and other parties. None of the other cases cited in that decision are challenged by BN.

demand for services to establish reasonable rates for transportation by rail." Further, section 702 of the Staggers Act was intended "to promote needed competition for transportation of low sulphur coal from the Powder River Basin that is used by utilities in many states." [10] Thus, it reflects specific Congressional intent favoring promotion of competition for Powder River Basin coal. The introduction of CNW into this market would increase competition.

Most of the coal moving from the Powder River Basin will be used to produce steam for the generation of electricity. In siting a new plant, a utility must consider, among other things, the availability of transportation alternatives. At this stage it will ordinarily have a number of prospective sites for construction, and thus more than one choice of a delivering carrier. The utility will be in a position to negotiate favorable contract rates which in effect preserve the advantages of pre-siting competition. *See, Union Pacific-Control-Missouri Pacific; Western Pacific*, 366 I.C.C. 459, (1982).

Therefore, although we do not claim that the addition of CNW as an origin carrier for coal will assure competition on all movements, CNW's participation should assure transportation options for all or most Powder River Basin coal users who will construct new plants for the use of this coal.

In conclusion, by arguing that we did not rely on the need for competition in certifying the joint line BN consistently misses the key point: the public interest would be best served by having the potential competitors join forces in building a line yet remain competitors in serving the companies relying on this coal.

Nor does it advance BN's jurisdictional argument to note that our authority to certfiy rail construction and operation under 49 U.S.C. 10901 is permissive only. BN

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[10] H.R. REP. No. 1430, 96th Cong., 2d Sess. 139 (1980).

argues correctly that under the certificate issued, both BN and CNW could have declined to exercise the authority altogether. Nevertheless, BN chose to go forward with the project, and CNW seeks to do likewise. Thus, we are not forcing either party to construct a line or to undertake operations which they are unwilling to perform. Rather, we are, in this highly unusual situation, assuring that CNW retains the opportunity which was granted by our certificate to operate over the line. The parties have failed to agree, yet agreement is essential if there is to be a joint operation and ownership. Moreover, as we explained in our *1979 Decision*, joint construction, operation, and ownership necessarily call for an agreement, and no such agreement governing the line has ever taken effect even though our *1976 Decision* specifically reserved our authority over such an agreement and even though 49 U.S.C. 10901 specifically requires us to approve operation as well as construction. Therefore, it has become necessary for us to prescribe a joint operating agreement including a buy-in price and other essential terms.

Definition of the Joint Line

The Powder River Basin line as proposed in 1976 resembles an inverted Y. The main part of the line extends from Coal Creek Junction in the north to Shawnee Junction in the south. The eastern leg of the Y which was to extend from Shawnee Junction to Shawnee and was to be used by CNW, has not yet been built. Neither party contends that the cost of constructing this leg should be included in the price prescribed here. The western leg of the Y extends from Shawnee Junction to Fisher, and from Fisher to Orin. The segment between Shawnee Junction and Fisher was built solely for the use of BN which does not argue that the cost of constructing this property should be included in the buy-in price to be prescribed. There is a dispute, however, with regard to the 2.68 mile segment between Fisher and Orin. This line was originally owned solely by CNW, but a one-half interest in the

line was purchased by BN for $5,000 in Finance Docket No. 28804, *Burlington Northern, Inc.—Acquire and Operate—Chicago and North Western Transportation Company Between Fisher and Orin in Converse County, WY* (not printed), served December 27, 1978. As noted in that decision, the purpose of this transaction was to allow BN to obtain access to its existing lines to enhance the transportation of coal from the Powder River Basin. BN made substantial investments to upgrade this route to handle unit train coal. Now it argues that CNW should pay for half of this cost. CNW argues that it has no desire to use this segment for the transportation of coal, and that it should not be forced to pay for this upgrading.

We agree with CNW. The parties already have perfected their ownership interests in the line. If the contract which governs that joint ownership does not require CNW to pay these costs, and it apparently does not, then we see no reason to force CNW to pay. Accordingly, the segment between Fisher and Orin will not be included in the agreement and purchase price prescribed. Our consideration will be limited to the line between Coal Creek Junction and Shawnee Junction.

Buy-in Price

This section will explain our method of prescribing a fair buy-in price for CNW's share of the costs of the line. As set forth below, the price will be determined by multiplying CNW's share of the historical cost ($41,824,186) by an appropriate rate of return (14 percent), subtracting depreciation ($5,140,563), and adding an amount to give consideration to the capital gains tax liability which BN will incur ($9,623,514). This produces a buy-in price of $76,193,880 for CNW's undivided one-half interest in the line.[11]

[11] A further explanation of our methodology is contained in Appendices A and B.

Rate of Interest

In our *May 1982 decision*, we said that a fair buy-in price would include the historic cost *times an appropriate interest rate* plus damages.

1. CNW's Methodology

CNW has proposed an interest methodology which we think does not adequately compensate BN for the risk of undertaking the project. It proposes to use the 8.75 percent rate specified in the joint operating agreement of 1975 for expenditures made before the November 30, 1979, expiration of the agreement. For expenditures thereafter it proposes an interest rate of prime plus one. This treats BN's expenditures as if they were a bank loan to CNW. The cost of such secured debt, however, is far lower than the cost of capital [12] which BN had to pay to finance the project. Thus this method produces an inadequate return. Similarly, the replacement cost methodology CNW mentions contains no return for risk. Using a replacement cost methodology would allow CNW to sit back and not commit financing until the line proved profitable and then acquire a 50 percent interest in a working line without bearing any of the cost of risk over the years since construction was begun. CNW should pay for the risk it has avoided by deferral of its payment.

CNW also contends that BN's compensation should be reduced because it has already received a return on capital from its ratepayers. We must reject this argument for two reasons. First, even if CNW had been free to operate over the line and share the traffic originating there from 1979-1982, it would not have been able to do so without constructing its connector line. That line, however, probably will not be constructed for another two years. Thus, even if CNW had made a contract with BN which would have allowed it to operate immediately in return for a

[12] BN estimates that this project was financed with a mix of 75 percent equity and 25 percent debt.

later payment at cost times an appropriate interest rate, it would not have been able to take advantage of that opportunity. Second, the amount of the return which BN received from its ratepayers is still the subject of extensive litigation before the Federal Courts and the Commission. Our maximum rate reasonableness standards have yet to be resolved in Ex Parte No. 347 (Sub-No. 1), *Coal Rate Guidelines-Nationwide*. The amount of compensation which BN will ultimately receive for its services is still uncertain.

2. BN's Methodology

BN has proposed a methodology based on its premise that this project is extremely risky. It has developed a project cost of capital of slightly over 20 percent. In constructing this cost of capital, BN has adjusted its debt equity ratio and its cost of equity capital. BN's system-wide ratio of debt to equity is 35-65 percent. [For a group of railroads of highest investment quality, including BN, the average is 40-60.] [13] BN argues that because this project was more risky than average, a higher percentage of equity financing is required. BN is correct that a higher degree of risk generally requires a higher percentage of equity financing.

BN has also developed a cost of equity capital of 25 percent based on the professional judgment of Morgan Stanley & Co. Incorporated (Morgan Stanley), an investment banking firm. Morgan Stanley examined various risk factors and determined that an equity cost of capital of 25 percent would be required by investors. This represents a premium of 8 percent above BN's cost of equity capital for this period.

BN stresses that we must assess the cost of undertaking this project from the time expenditures were begun rather than in hindsight. From the perspective of 1973, BN

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[13] Ex Parte No. 415, *Railroad Cost of Capital—1981*, 365 I.C.C. 734, 745 (1982).

faced serious risks. BN notes the large scale of this project which required an investment of $82 million, took several years to construct, and produced no return until 1979. BN argues that because of this long lead time, investors would require a premium return. BN did not know whether its ownership and operation of the project would be joint or single, because CNW's participation was and remains uncertain. Likewise, it did not know when and if any funds from CNW would be forthcoming. BN has bought a large amount of rolling stock, much of which could be idled if CNW diverts substantial traffic.

Further, BN contends that it was confronted with an uncertain market for the purchase of coal, largely because that market was dependent upon OPEC oil pricing policies. It faced possible erosion of the coal transport market due to potential coal slurry competition. Coal also experienced stiff competition from nuclear energy as a source of power for electric generation.

BN emphasizes its problems in achieving adequate returns on its unit train movements of coal. Since it was a pioneer in this market, it states that it had a lack of knowledge of its own transport costs. This resulted in rate agreements with major shippers, later construed to be contracts, which returned inadequate revenues on its investments. It was also troubled by regulatory uncertainty with regard to rate levels we would prescribe in litigated cases. BN concludes that these risk factors combine to make the Powder River Basin Project more risky than other projects undertaken during this period by BN. Based on a qualitative assessment of these risks, Morgan Stanley states that a rate of return on equity of 25 percent is required.

3. Conclusion

We conclude that a 14 percent cost of capital adequately compensates BN. BN notes that its corporate cost of capital averaged 14 percent over the period of construc-

tion. CNW notes that BN's cost of capital for the period from 1973 to 1982 ranged between 10.3 percent and 17.6 percent and averaged 13.5 percent. As we said in Ex Parte No. 393, *Standards for Railroad Revenue Adequacy*, 364 I.C.C. 803, 809 (1981):

> The standard we will use to measure the adequacy of the rate of return is the current cost of capital. Such a standard is widely agreed to be the minimum necessary to attract and maintain capital in the railroad, or any other industry. The cost of capital is the rate of return required for a firm by current and prospective holders of its securities. If a firm is unable to earn the cost of capital, investors will be unwilling to supply capital to it.

We have determined that the cost of capital standard, which we have used to determine revenue adequacy under the Staggers Rail Act of 1980 and as one factor in the prescription of maximum rates[14] for the transportation of coal, would also be an appropriate standard for determining a fair buy-in price for CNW's portion of the line. This standard compensates BN for its risk of expending funds which were required when CNW did not tender its share of the construction costs as they were incurred.

Although we acknowledge that BN faced risks in the Powder River Basin, these are the identical risks it faced on most of its investments at the time: uncertain coal market, potential slurry competition, nuclear energy competition, and regulatory uncertainty. Nevertheless, BN undertook a massive program of capital investment in the 70's, of which the Powder River Basin project was only a part, designed to increase its coal-hauling capacity. As noted in Burlington Northern, Inc.'s 1976 Annual Report to its shareholders (BNAR 1976), "These very substan-

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[14] We have consistently used fully allocated cost at the revenue need level as the starting point for constructing what would be a maximum reasonable rate.

tial outlays, past, present and planned, are required to increase the capacity of our rail plant and fleet to handle the escalating volume of coal traffic moving over its lines." From 1970 to 1976, BN spent $376 million for roadway capital programs and $1.4 billion for roadway maintenance, much of which was for coal related improvements and maintenance. BNAR 1976, p. 14.

These substantial investments were made because BN foresaw tremendous opportunities in the transportation of low-sulphur western coal for electric generation. Moreover, BN's cost of capital of 14 percent for the project period indicates the cost of obtaining financing for these improvement projects, of which the Powder River Basin was an integral part. (Even the cost of obtaining capital for the Powder River Basin project is included in the 14 percent average cost of capital cited by BN.) BN's allegation that a higher risk factor is required is entirely subjective. It is unsupported by any quantitative analysis, studies or workpapers.

Further, even though we agree that the risk of investment should not be viewed in hindsight, BN's investments in the Powder River Basin were relatively low ($1 million total) until 1976. Perhaps this is because final Commission approval of construction was not given until January, 1976. Since no substantial amounts were expended and final regulatory approval was not granted until this time, BN could have backed out (and if regulatory authorization were denied, it would have been required to back out). But by 1976, the prospect for marketing and transporting Powder River Basin coal had clarified, and appeared excellent.

Finally, BN had no right to assume that CNW would not enter the project. BN was never authorized to own or operate the line independently, yet it chose to go ahead with construction anyway. Further, the chance that CNW might not enter only enhanced BN's prospect for a healthy

return because it would face little rail competition for the transport of coal out of the coal rich Powder River Basin.

Depreciation

CNW argues that we should deduct depreciation due to the wear and tear on the line during its three years in service. To the extent that BN has used up the physical plant, it has received a return of its capital. If a portion of the investment made by BN on behalf of the CNW has been returned to BN, then that fact should offset the extent to which CNW should be required to compensate BN. Thus we will deduct historical depreciation in determining a fair buy-in price. As shown in Appendix B, depreciation on one-half of the line would be $5,140,563.

Capital Gains Tax

BN asserts that the sale of a 50 percent interest in the line will result in the imposition of capital gains tax liability that it would not have experienced if the project had been financed jointly as planned. CNW contends that BN's request for tax indemnification is counter to normal practice in sales transactions where the seller is responsible for any tax liability incurred as a result of the transaction. Further, the CNW argues that even though the BN will incur tax liability it will be able to defer payment of this tax because of tax credit carryforwards.

We agree with the BN that it should be compensated for capital gains tax liability. There would have been no sale and thus no taxable event except for CNW's late participation. BN must make an adequate return after taxes are taken into account.

Further, we do not regard CNW's argument that the BN will be able to defer payment of the tax as having any bearing on the issue because any investment tax carryforward is the property of BN's shareholders and should not inure to the benefit of the CNW.

We conclude that the buy-in price we prescribe should allow BN to earn a 14 percent return on its investment after consideration has been given to the capital gains tax.

Terms of the Agreement

We are adopting the agreement proposed by BN with certain exceptions noted below. Except for those matters, CNW noted that the differences between its version of the agreement and BN's are ministerial only. Of course, the parties are free to make any mutually agreed upon changes in the agreement as long as those changes are in compliance with our *Connector Line* decision.

1. Rent

CNW has proposed a usage fee (rent) that each party would pay for the use of the other's undivided one-half interest of the trackage. It proposes a fee of one-half of BN's original cost of construction times 10 percent per annum. The parties would be obligated to make rental payments based on their relative use of the track for the next 10 years.

CNW argues that this agreement would be reasonable because the parties agreed to similar terms applicable to a longer period in their 1975 agreement. It stresses that this provision reflects BN's better opportunities to use the line because it handles substantial overhead movements in addition to traffic originating on the line.

BN proposes a similar payment, but apportioned by relative ownership rather than use. Because the ownership interests would be equal, the payments would cancel out. BN argues that if each party had constructed its own line, each would have borne an equal share of the ownership costs. But the agreement proposed by CNW would in effect reduce its ownership and construction costs to less than one-half the cost of the project. BN notes that maintenance and operational costs which vary with use will be shared on a car-mile use basis.

We agree with BN, and thus will prescribe the version of this provision which it advocates. There is no good reason to require these payments to be based on relative use. If the interests in the line are undivided, then there is no need for the carriers to pay each other anything for use of the line. The carriers have already agreed to divide maintenance-of-way expenses based on relative use, and this should sufficiently compensate CNW for any expense caused by BN's greater use of the line.

2. Labor Indemnification

BN argues that we should include a provision which requires CNW to indemnify it for any labor protection expenses in excess of $250,000 which are caused during the next 5 years by CNW's late entry into the project. It notes that it has hired numerous employees to accommodate the demand for the transportation of coal. These employees may be displaced if it is forced to share the traffic with another carrier.

CNW replies that a labor indemnification provision would be equivalent to writing BN a blank check for any labor protective costs that it may incur as a result of changes in operations on the line over the next 5 years.

We will not impose the labor indemnification provision. We have declined to impose similar provisions in numerous consolidation proceedings because it is so difficult to determine which personnel changes are due to management discretion or business cycles and which are due to traffic diversion. See *Burlington Northern, Inc.-Control & Merger-St. L.*, 360 I.C.C. 788, 949 (1980) and *Guilford Transp. Industries, Inc.-Control-D&H Ry. Co.*, 366 I.C.C. 396, 406 (1982). Ordinarily, a carrier is responsible for its own employees. Further, BN currently handles all traffic on the line, and we will not assume that it will sit idly by and allow CNW to divert half of this traffic. Therefore, the extent to which traffic is diverted depends upon the competitive efforts of the carriers. We should

not penalize CNW to the extent that it is able to divert traffic by forcing it to bear labor protective expenses for BN employees.

3. Billing for Maintenance Expense

Under the agreement proposed by both parties, BN would perform maintenance on the line for which it would bill CNW. BN proposed submitting an estimated bill (based upon the previous month's expenses) on the first of the month for payment by the twentieth of that month. CNW proposed an estimated bill by the twentieth and payment by the tenth of the next month. We are persuaded by BN's argument that its provision allows it to be compensated for the work as it is being performed. BN should not be required to extend credit for these expenditures, even for the brief time which CNW suggests.

4. Damage to Third Parties

The parties do not agree with regard to provisions concerning loss or damage to third parties or to joint employees or property where the cause of the loss cannot be ascertained. CNW proposes allocation of these costs on a use basis, while BN proposes an ownership basis. We conclude that CNW's version is the more logical because these costs, like maintenance costs, are most closely related to relative use.

5. Abandonment

BN proposes that in the event of abandonment of the line by one of the parties, the other shall have a sixty-day option to purchase the interest of the other at the net liquidation value of one-half of the line. CNW contends that the remaining party should be required to buy the line. We see no reason to require either party to purchase the line back again against its will. CNW should not be permitted to hedge its investment in this manner against the possibility that its participation will not be successful.

If CNW chooses to abandon its interest, and BN chooses not to buy it, it is free to attempt to sell it to any party.

Closing

In our August 20, 1982 decision, we stated that closing must take place by November 5, 1982. We set this date in view of the fact that it is unfair to force BN to wait indefinitely for CNW to tender the funds required for its participation in the project.

CNW is concerned that the time for filing judicial appeals will not expire until December 21, 1982. It argues that we should take the possibility of litigation into account in determining the closing date. It states that an appeal filed by BN will preclude it from obtaining financing.

BN urges that we not allow any further extension beyond November 5. It argues that CNW wants to delay the closing date only because it is unable to pay for its share of the project.

Both parties have legitimate concerns. Accordingly, we are proposing the following procedure for closing. CNW must demonstrate that it is willing and able to tender the fair buy-in price on or before November 5, 1982. We suggest that it present evidence of an irrevocable line of credit from its lender which clearly demonstrates its present ability to tender the amount we have prescribed.

BN will then have to decide whether it will accept the terms of our decision, and the purchase price to be tendered by CNW. If BN indicates that it will accept the money, it also agrees that it will not challenge our decision. It would be manifestly unfair for BN to accept a tender and then challenge our decision prescribing it. CNW would then have 15 days to make the actual tender. If BN chooses instead to preserve its rights to challenge this decision in the court of appeals it should so inform

CNW, which will then have no obligation to tender the purchase price until the litigation is terminated.

Finally, CNW has claimed that there are certain impediments to closing including alleged defects in BN's land titles and the assignability of State and Federal easements. We are not convinced that these are serious problems which would hinder the ability of the parties to operate a joint rail line. BN itself would not have constructed its line if it was uncertain as to the title to a continuous right-of-way. We will, if necessary, require BN to cooperate with CNW and assist it in obtaining any required State or Federal easements.

This decision will not significantly affect either the quality of the human environment or energy consumption.

It is ordered:

1. BN shall sell an undivided one-half interest in the line from Shawnee Junction to Coal Creek Junction to CNW for $76,193,880.

2. The joint operation of the line will be governed by the agreement BN has proposed, except those provisions concerning labor indemnification and damage to third parties, sections 5.8 and 5.3 of the agreement, respectively. With regard to those provisions, the version proposed by CNW shall be adopted. The agreement will be subject to the conditions for the protection of employees stated in *Norfolk and Western Ry. Co.—Trackage Rights-BN*, 354 I.C.C. 605 (1978), as modified by *Mendocino Coast Ry., Inc.—Lease and Operate*, 360 I.C.C. 653 (1980).

3. CNW must demonstrate by November 5, 1982, that it is willing and able to tender the purchase price. BN must immediately indicate whether it is willing to accept a tender. If so, CNW will then have 15 days to make the actual tender.

4. The decision will be effective on its date of service.

By the Commission, Chairman Taylor, Vice Chairman Gilliam, Commissioners Sterrett, Andre, Simmons, and Gradison.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

APPENDIX A

Calculation of Buy-in Price as of October 31, 1982 [1]

Historic cost plus interest [2]	$71,710,929
Less depreciation based on historic cost	$ 5,140,563
Plus capital gains tax [3]	$ 9,623,514
Buy-in price	$76,193,880

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[1] All calculations represent a one-half undivided interest in the line.

[2] Calculated by compounding a 14 percent annual rate of interest monthly for BN's expenses for constructing the line between Coal Creek Junction to Shawnee Junction shown in the "Work Papers" attached to BN's response filed September 22, 1982.

[3] Capital gains tax is calculated as follows:

Historic cost plus interest, less depreciation based on historic cost, less the historic basis, subtracted from the same calculation divided by 0.72.

$$\begin{array}{r} \$71,710,929 \\ -5,140,563 \\ \hline \$66,570,366 \\ -41,824,186 \\ \hline \$24,746,180 \end{array}$$

$$\frac{\$24,746,180}{.72} - \$24,746,180 = \$9,623,514$$

APPENDIX B

VALUATION OF THE LINE AND DEPRECIATION RESERVE DEVELOPMENT

SUMMARY

Three valuation methods have been used for the Burlington Northern-Chicago and North Western joint line in the Powder River Basin. For purposes of this analysis, the line has been defined as running from Coal Creek Junction to Shawnee Junction, Wyoming. The results are summarized as follows:

- Depreciated replacement cost— $ 96,036,000
- Depreciated historical cost (CNW)— $ 72,122,000
- Depreciated historical cost (BN)— $ 73,367,245
- BN's present value less depreciation— $138,038,000

For comparison purposes, BN's final price is $95,500,000 for the line segments Coal Creek Junction to Shawnee Junction and Fisher Junction to Orin Junction. CNW's final offer is $60,000,000 for the line segment Coal Creek Junction to Shawnee Junction.

METHOD OF ANALYSIS

We have used a six-step procedure to determine the replacement cost and the depreciation reserves to apply to various indicators of present value.

1. Determine the mileage contained in each historical cost and scope of the joint line.
2. Simulate the project investment flow by primary account by using BN's annual expenditure totals, and CNW's primary account distribution.
3. Develop replacement cost using individual accounts by year applying selected indexes to the investment flow distribution for all track constructed or improved.

4. Develop depreciation reserves using the latest depreciation rates and line specific operations information from the record.

5. Calculate depreciated replacement cost.

6. Prorate the total cost on a route-mile or track-mile basis to match mileage assigned to the joint line as defined for this proceeding.

MILEAGE DETERMINATION

A detailed analysis was made of the data submitted to determine the miles of track constructed by BN. This included main track (102.8 miles), second track or passing sidings (27.4 miles), other sidings or branches (8.0 miles) for a total of 108.5 route-miles and 138.2 track-miles. This was necessary since both parties did not define the joint line as the same amount of trackage. As a point of interest, neither party seems to have included the siding at East Bill or the Jacobs Ranch Branch. No determination can be made concerning the inclusion or exclusion of these sections from the historical costs or the final offers.

HISTORICAL COST OF THE LINE

The two parties are in substantial agreement on the total historical cost of the line, including all track construction and improvements from Coal Creek Junction to Bridger Junction (Verified Statements of Voldseth and Butler for CNW, Brink for BN). There are differences in the distribution of this total cost to the primary accounts. We have found no evidence proving the validity of one over the other. Since CNW's amount is slightly higher, we have used CNW's historical cost of $90,262,000 for the remainder of the analysis.

Having decided on the amount to be used for historical costs, we needed a time phasing of investment over the life of the project, May 1973 to May 1982. BN has sub-

mitted the only evidence which gives an indication of the expenditure rate. This data is in the form of monthly totals only and is not distributed by account. In addition, it includes only the track from Coal Creek Junction to Shawnee Junction and Fisher Junction to Orin Junction (Runde/Brink workpapers, 9-21-82, for BN). In view of this, we used the data to develop percentages of investment made for each year from 1973 to 1982 and applied them to CNW's distribution by account and total historical cost. This produces a matrix of costs arithmetically simulating the project's investment flow by year for each account. At this point the information was in usable form to apply selected indexes to bring all costs to 1982 dollars.

REPLACEMENT COST

The replacement cost was calculated using selected indexes similar to those recommended for use with the ICC accounts. This is actually a trended original cost or current cost.

For Account 1, Engineering, the AAR Wage and Supplements Index for the Western District was used. We believe that this account is primarily a labor account and have chosen an index accordingly.

For Account 2, Land, the US Department of Agriculture Farm Real Estate Value per Acre series was used. This index is available by state, and Wyoming was used specifically.

For Account 3, Grading, the Oil and Gas Journal Construction index was used. This index is composed of such items as clearing, grading and backfilling and is representative of similar operations for railroad construction.

For Account 4, Other Right-of-Way Expenditures, the ENR Construction Cost Index was used. This account contains costs relating to farm crossings, drains and other facilities that cross the right-of-way. This is generally a labor intensive account, with some basic construction materials included.

For Account 6, Bridges, Trestles and Culverts, the ENR Building Construction Index was used. This index includes the skilled labor and types of construction material associated with these structures.

For Account 8, Ties, the AAR Forest Products Index for the Western District was used. The ties used on this line are conventional wood types and this index contains a component based on ties.

For Account 9, Rail, the BLS CC 1013-0241 for Carbon Steel Rails has been used. This index is directly relevant to rail used in this account.

For Account 10, Other Track Material, the AAR Iron and Steel Products Index for the Western District was used. This account includes such items as tie plates, joint cars, rail anchors, spikes, etc.

For Account 11, Ballast, the BLS cc 13-21 index for crushed stone, gravel and sand has been used.

For Account 12, Tracklaying and Surfacing, the AAR Wage and Supplement index for the Western District was used. This account is a labor account that includes the cost involved in installing the material in accounts 8, 9, 10, and 11.

For Account 13, Fences, Snowsheds and Signs, the ENR Construction Cost Index was used. This is primarily a labor account with some material.

For Account 17, Roadway Buildings, the ENR Building Cost Index was used. This account contains tool houses, section houses, bins, sheds, etc.

For Account 27, Signals and Interlockers, the Producer Price Index was used as a general indicator.

For Account 39, Public Improvements, the ENR Construction Cost Index was used. This account contains crossings, highway bridges, relocation of roads, etc.

These indexes were tabulated for each year from 1973 to 1982, using 1982 as the base year for factor determination. The factors were applied to each account for each year over the life of the project. The final replacement cost for the entire line from Coal Creek Junction to Bridger Junction was $120,446,000 based on a historical cost of $90,262,000.

SERVICE LIFE

There were several sources used in the development of service lives and salvage values for the accounts involved. The principal source was Decision R-823-B, effective 1-1-80, with a service date of 6-6-80. This source was used for Accounts 1, 3, 4, 6, 13, 17, 27, and 39. These rates were also confirmed as being used in the 1980 and 1981 R-1 Annual Reports for Burlington Northern. No service life was used for land since this is not considered a depreciable item. The remaining accounts—8, 9, 10, 11, and 12—have service lives based on evidence submitted in the record in conjunction with other sources such as the Maintain program and the OPUS program developed by L. E. Peabody Associates. These five accounts will be discussed individually.

Service Life—Ties

Using the Maintain program's BN data from 1978 through 1981, we have determined that the average tie replacement cycle for Track Category A (20 million gross ton miles per mile or more) was 18.6 years based on an average loading of 32.3 MGTM per mile for the same time period. We also used the OPUS program developed by L. E. Peabody and Associates to test the tie maintenance cost sensitivity to traffic loading increases and mix changes. We found that the tie maintenance cost using traffic volumes consistent with those on the Powder River line were 1.22 times higher than the cost using average Track Category A traffic volumes. In both cases the traffic was assumed to be entirely unit coal trains producing

a heavy wheel loading classification in the formula. We tested a third alternative of evenly mixed regular freight traffic and coal trains, finding that there was no difference in the projected tie maintenance cost. Therefore, we feel that the service life for ties would be proportional primarily to traffic volume, not heavy wheel loading. The average life cycle calculated from the Maintain program was adjusted by the increased traffic volume increment, giving an anticipated tie life of 15.2 years. We have used an investment cost of $15 each and a salvage value of $2 each.

Service Life—Rail

We used several sources of information to determine what the expected rail life would be for this line. The first source was the Maintain program, where a similar process to that used in calculating tie replacement rate was used. The 4-year average rail replacement rate for BN's Track Category A was 16.3 years, based on 32.3 MGTM per mile traffic volume. Rail wear is generally proportional to traffic volume at a minimum and special consideration has been given recently to the effect of heavy wheel loadings producing disproportionate wear. These studies have shown a significant reduction in rail life as car weights approach or exceed 263,000 lbs. In an attempt to incorporate this effect in our depreciation rates, we investigated three methods of determining the potential effect of this type of traffic on rail life.

Evidence was submitted which gave traffic estimates of nine to twelve trains per day each way on the line. These trains were generally made up of 110 cars, each with a load capacity of 100 tons. Consideration has been given to empty return hauls. Using these numbers, we estimate that the line has been carrying about 70 MGTM per mile, as an average, since it opened in November, 1979. Using this information with the Maintain data, we estimated the expected rail life to be 7.5 years.

Using the OPUS program as a second indicator of the expected effect of heavy wheel loading on rail wear, we found that there was a significant increase in the projected rail maintenance cost as more of the traffic was proportioned to heavy wheel loading. The total increase from a mixed standard freight-heavy wheel loading at 32.3 MGTM per mile to full heavy wheel loading at 70 MGTM per mile was 1.86. Therefore, the expected rail life using this information was estimated to be 8.8 years.

The third method uses the total expected life of rail in MGTM, stated in the record to be approximately 500 million gross ton miles. In our opinion, using other sources as references, this is a reasonable figure. Using the average loading calculated above, the expected rail life would be 7.2 years.

Any of the three methods discussed are reasonable indicators of rail life under specific traffic conditions described in the various Verified Statements submitted. Due to the imprecision and vagueness of the evidence, we are electing to take a straight average of the three methods. This produces an expected rail life of 7.8 years. We have used an investment of $500 per NT, based on BN's 1981 Annual Report, and a salvage value of $50 per NT based on the August rail scrap prices on the Chicago market.

Service Life—Other Track Material

As a minimum, we are estimating that tie plates, joint bars, and other special rail fittings have an expected life of at least 2 rail replacement cycles, or 15.6 years. We have used an investment amount of $700 per NT and a salvage value of $73 per NT based on the August rail scrap prices on the Chicago market.

Service Life—Ballast

Using data from the Maintain program, the 4-year average ballast replacement rate for Track Category A is

168.6 cubic yards per mile. The record contains evidence that 480,238 CY were used in the construction of the entire line. With this information we estimate the expected ballast life to be 20.6 years. We have assumed ballast has no salvage value.

Service Life—Tracklaying and Surfacing

We have used a dollar weighted average of service lives from accounts 8, 9, 10, and 11 to estimate the rate for this account.

DEPRECIATION RESERVE

The depreciation reserve based on the replacement cost for each account was developed using the Commission's life analysis system. The overall depreciation reserve is $15,027,000 based on a replacement cost of $120,446,000 for the entire line. At this point, the replacement cost and depreciation reserve can be converted to unit costs per route-mile or track-mile and prorated over any segment of the line.

The depreciation reserve based on the historical cost for each account was developed in a similar manner. The overall depreciation reserve is $11,094,000 based on a historical cost of $90,262,000 for the entire line. At this point, the historical cost and depreciation reserve can also be converted to unit costs per route-mile or track-mile.

Based on BN's historical cost for the Coal Creek Junction-Shawnee Junction section of the line, $83,648,371 as shown in the BN workpapers submitted 9-21-82, the depreciation reserve is $10,281,126.

We have also calculated a depreciation reserve based on BN's present value of the line. This was also done by account using the same service lives as applied to the replacement cost of the line. The depreciation reserve is $20,161,000 based on a present value of $161,593,225 (Verified Statement of Roger Miller, Exhibit A, 8-4-82).

Service Date: Aug. 20, 1982

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 29066 *

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY APPROVAL OF TERMS OF CONSTRUCTION, OWNERSHIP AND OPERATION OF A LINE OF RAILROAD IN CAMPBELL AND CONVERSE COUNTIES, WYOMING

Decided: August 18, 1982

On May 21, 1982, we directed Burlington Northern Railroad Company (BN) to furnish certain information which would allow us, if necessary, to prescribe an agreement between BN and Chicago and North Western Transportation Company (CNW) for CNW to purchase from BN a one-half undivided interest of the "Joint Line" in the Powder River Basin. We indicated in our prior decision that the buy-in price would include CNW's share of the construction costs adjusted to reflect an appropriate interest rate, plus any damages incurred by BN due to CNW's failure to consummate the joint agreement.

* This decision embraces F.D. No. 28934, Chicago and Northwestern Construction Company Construction and Operation of a Line of Railroad in Niobrara and Goshen Counties, Wyoming and in Sioux and Scotts Bluff Counties, Nebraska, F.D. No. 29332, Application of Western Railroad Properties, Incorporated for Approval of Trackage Rights Over Track of Union Pacific Railroad Company Near Joyce, Nebraska, F.D. No. 29333, Western Railroad Properties, Incorporated-Acquisition of Segment of Chicago and North Western Transportation Company's Line From Shawnee to Crandall, Wyoming, Including the Right to Operate the Line as a Common Carrier, and F.D. No. 29398 (Sub-No. 1), Application of Chicago and Northwestern Transportation Company Under Section 11343 of the Interstate Commerce Act for Approval of its Operation of a Line of Railroad Between Coal Creek Junction, Wyoming, and South Morrill, Nebraska pursuant to an agreement with its subsidiary, Western Railroad Properties, Incorporated.

BN indicates that a fair buy-in price is $95.5[1] million, while CNW believes that the fair buy-in price is $53.6 million.

The wide disparity between these estimates makes our task of prescribing a proper purchase price extremely difficult. We would prefer to settle the several matters over which the parties continue to disagree only as a last resort. Because of our strong preference for a private sector solution, and because there appears to have been considerable progress in the negotiations, we will extend the August 23, 1982 deadline, established in *Chicago & N. W. Transp. Co.—Construction*, 363 I.C.C. 906 (1981) and give the parties an additional 30 days to negotiate the terms of an agreement.

At the end of this time the parties, if they have not reached agreement, should submit and fully justify their final best offers. If necessary, 30 days thereafter we will issue a decision prescribing an agreement based on the offer which reflects most accurately a fair buy-in price. All supporting arguments and relevant work papers should also be submitted by September 22, 1982. The parties should certify that they have exchanged final offers for the purchase and sale of the line and that they agree to the final offer arbitration procedures discussed in this order. We will select whichever of the two offers is closest to the fair buy-in price, and will not select a different amount.

The parties are also in disagreement as to a number of important non-price terms of the agreement. If necessary, we will also resolve these terms. The parties should indicate the terms upon which they agree and disagree. For those terms on which the parties do not agree, they should submit specific terms, with full justification.

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[1] CNW indicates that BN has agreed that it has erred in computing the buy-in price, and that it should be $90.5 million.

We think that this final offer arbitration process will be useful here in encouraging the parties to settle their differences and come forward with reasonable offers.

Our July, 1981 decision in this proceeding stressed that "it is not in the public interest to permit CNW to retain indefinitely a right to operate over the Joint Line if it is unable to obtain the necessary financing for its share of construction costs," and that we were "mindful of the burden, financial or otherwise, which BN has sustained while CNW has been attempting to complete its financial arrangements." 363 I.C.C. at 919. We thus required, unless BN and CNW agreed otherwise, that CNW tender its share of the project costs to BN by August 23, 1982.

As required by our order, CNW has placed itself in a position to tender its share of project costs by August 23, 1982. However, it cannot actually tender its share until after that share has been determined (by agreement or, if necessary, by order). Accordingly, we will extend the August 23, 1982 deadline to November 5, 1982. This deadline provides us with ample time to render a decision, if necessary, setting the purchase price, and further provides CNW with time to arrange its tender.

This decision will not significantly affect either the quality of the human environment or energy consumption.

It is ordered:

1. If BN and CNW are unable to agree on the terms for joint ownership and operation of the Powder River Basin Line, they shall submit their fully justified final best offers by September 22, 1982.

2. Condition (c) of ordering paragraph 1 of our decision in *Chicago & N. W. Transp. Co.—Construction*, 363 I.C.C. 906 (1981), is amended to read as follows:

(c) The Chicago and North Western Transportation Company must tender its share of project costs

to Burlington Northern, Inc., including interest and including any damages sustained by Burlington Northern, Inc., on or before November 5, 1982, or the authority granted to CNW herein and in Finance Docket No. 27579 shall expire.

3. Ordering paragraph (7) of our decision in *Chicago & N. W. Transp. Co.—Construction* is amended to read as follows:

If the authority or exemption granted by this decision is not exercised on or before November 5, 1982, then that portion of this order pertaining to the unexercised authority shall no longer be effective.

4. This decision is effective on the date it is served.

By the Commission, Chairman Taylor, Vice Chairman Gilliam, Commissioners Sterrett, Andre, Simmons, and Gradison.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

Service Date: May 21, 1982

INTERSTATE COMMERCE COMMISSION

DECISION

Finance Docket No. 29066

CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY
APPROVAL OF TERMS OF CONSTRUCTION, OWNERSHIP AND
OPERATION OF A LINE OF RAILROAD IN CAMPBELL AND
CONVERSE COUNTIES, WYOMING

Decided: May 14, 1982

On February 23, 1982, the Chicago and North Western Transportation Company (CNW) and its wholly-owned subsidiary Western Railroad Properties, Inc. (WRPI) filed a petition for an order to show cause why the Commission should not now prescribe the terms of a joint line agreement between CNW and the Burlington Northern Railroad Company (BN). For the reasons discussed below, we are granting CNW/WRPI's petition.

Background

On July 24, 1981, the Commission served an administratively final decision in this consolidated proceeding granting a number of related applications filed by CNW and WRPI. *Chicago & N.W. Transp. Co. Construction*, 363 I.C.C. 905 (1981) (*Joint Agreement*). We authorized construction of a new line of railroad by CNW and WRPI, approved certain terms of a joint operating agreement between CNW and BN, and approved a series of related transactions needed to implement the proposal by CNW and WRPI to provide rail transportation from Wyoming's coal-rich Powder River Basin.

We have recognized the importance of the Powder River Basin to our national energy policy, the importance of the coal reserves in the Powder River Basin, and the need for competitive transportation of coal from the

Powder River Basin. *Id.*, at 926-927. Although not directed at the Commission, Section 702 of the Staggers Rail Act of 1980, Pub. L. No. 96-448, expresses the clear Congressional intent favoring competitive transportation in the Powder River Basin. "This provision is included to promote needed competition for transportation of the low-sulphur coal from the Powder River Basin that is used by a great number of utilities in many states." H.R. REP. No. 96-1430, 96th Cong., 2d Sess. 139 (1980). This decision is intended to promote competition in the Powder River Basin by building a frame work under which competitors will contract for the joint operation of the line.

In approving the joint operating agreement, we recognized that the Commission had in 1976 authorized construction of a joint line into the Powder River Basin by CNW and BN. The two carriers executed an agreement in 1975 to implement the project, but the agreement was not submitted to the Commission at the time. After the construction project received Commission approval, CNW was unable to secure the necessary financing for its share of the Joint Line. BN agreed to extend the original deadline under the agreement until November 30, 1977, but CNW was still unable to secure financing. BN and CNW then negotiated a Second Supplemental Agreement providing that CNW would be deemed to have withdrawn from the Joint Line Project if it did not meet its share of the costs, estimated at about $60 million, by November 30, 1979. In the meantime, CNW and WRPI filed an application with the Federal Railroad Administration (FRA) for financial assistance to be used to pay for CNW's interest in the Joint Line and to upgrade its existing main east-west line. In 1979 CNW revised that proposal; under its new plan, it would rehabilitate only that portion of its line between Shawnee and Crandall, WY, and would build a connection between its line at Van Tassell, WY and the Union Pacific Railroad Company (UPRR) line at Joyce Station, NE (the "Connector Line"). CNW anticipated that its revised proposal would cost about $300 million,

approximately $60 million of which would finance its share of the Joint Line costs.[1]

In June 1979, CNW filed an application requesting Commission approval of the Joint Line Agreement. CNW has not yet paid its share of construction costs for the Joint Line, but now claims it has obtained commitments from financial institutions which will allow it to pay those costs. BN, in the meantime, constructed the line and has been operating it for over two years.

The Commission issued its decision on CNW's various applications in July, 1981.[2] We approved construction of the Connector Line as well as several transactions necessary to implement CNW's project.[3] We also approved the Joint Line Agreement (and in doing so disapproved several specific terms because of their anticompetitive nature). Our approval was given despite BN's objections; BN claimed that since the 1979 agreement expired by its own terms, there no longer existed any agreement over which our jurisdiction could be exercised. We pointed out in the decision that some agreement between BN and CNW was a necessary complement to our 1976 authoriza-

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[1] In May, 1981, CNW withdrew its FRA application and indicated to the Commission that it planned to privately finance the project.

[2] *Chicago & N.W. Transp. Co.-Construction*, 363 I.C.C. 905 (1981).

[3] F.D. N. 29332, Application of Western Railroad Properties, Incorporated for Approval of Trackage Rights Over Track of Union Pacific Railroad Company Near Joyce, Nebraska; F.D. No. 29333, Western Railroad Properties Incorporated-Acquisition of Segment of Chicago and North Western Transportation Company's Line From Shawnee to Crandall, Wyoming, Including the Right to Operate the Line as a Common Carrier; and F.D. No. 29398 (Sub-No. 1), Application of Chicago and North Western Transportation Company Under Section 11343 of the Interstate Commerce Act for Approval of its Operation of a Line of Railroad Between Coal Creek Junction, Wyoming, and South Morrill, Nebraska, Pursuant to an Agreement with its subsidiary Western Railroad Properties, Incorporated.

tion of a joint, rather than a solely-owned line. We stated that if CNW were capable of repaying BN the funds owed to it, BN's failure to reach some agreement with CNW would be tantamount to denying CNW the means to effectuate the Certificate authority we awarded in 1976. 363 I.C.C. 918. BN did not appeal that decision, which is now before the D.C. Circuit on appeal on other grounds.[4]

CNW's Petition. CNW now argues that BN has taken the position that the Joint Line Agreement has terminated and that all terms for ownership and operation are "up for grabs". CNW states that while it disagreed with that view, it offered to negotiate as though the Agreement no longer existed. According to CNW, BN then renewed a proposal that the parties establish an agreed "buy-in" price but failed to name a figure. BN also rerenewed its claim for damages, but failed to specify either the nature or amounts of those damages. In January, 1982, BN indicated again its position that no agreement now exists, and further stated certain terms it considered necessary to any future agreement. It demanded a right to veto CNW's arrangements for financing the coal project, and it stated its unwillingness to enter into an agreement in which entities other than CNW would acquire residual interests in the operating contract in the event that WRPI failed.

CNW argues that BN's stated position conflicts with our July, 1981 decision, in which we approved the financial structure proposed by CNW and WRPI. CNW claims that BN is unwilling to negotiate in good faith, as demonstrated by its refusal to propose specific terms, including a suggested "buy-in" price.

Therefore CNW requests us to issue an order directing BN to show cause why the Commission should not pre-

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[4] *Mobil Oil Corp.* v. *I.C.C.* and *Wyobraska Landowners Association* v. *I.C.C.*, Nos. 81-2037 and 81-2038.

scribe the terms of a joint line agreement between CNW and BN. It argues that the Commission has the authority to prescribe the terms of the agreement, due to our retention of jurisdiction and other language in our July, 1981 decision in F.D. No. 29066. It further argues that as a policy matter the Commission should set the agreement terms because the alternative to our action would be protracted litigation to secure judicial enforcement of our decision. In its petition, CNW includes a copy of the 1975 agreement, modified to reflect events occurring after that date and also to reflect our decision to strike certain portions of the agreement. CNW suggests that we rely on this document in prescribing the terms of the Joint Line Agreement.

BN's Reply. BN submitted a letter dated March 2, 1982, stating that it had, in fact, been negotiating in good faith with CNW, citing its extensions of the 1975 and 1977 agreements and its decision not to appeal the *Joint Agreement* decision. It objects strenuously to CNW's proposal to buy into the project at prices based on 1975 costs (BN contends that those costs reflect more risk to investors than that posed by the project today). BN also states its desire to scrutinize all details concerning CNW's financing proposal, including any plans for the disposition of residual interests in the event of CNW or WRPI's default. Finally, BN requests the Commission to "reiterate . . . that the original agreement no longer exists" and that it is not the basis for negotiations.

Discussion and Conclusions

Jurisdiction. We possess jurisdiction to require BN to show cause and, if necessary, to prescribe the terms and conditions of a joint line agreement. Jurisdiction derives primarily from our 1976 decision to certificate BN and CNW under 49 U.S.C. § 10901 to construct and operate a joint line. That authorization necessarily required that there be an agreement between the two carriers to con-

struct and operate that joint line. BN chose to construct the line and begin operations without CNW's participation. However, it could not, by that action, extinguish CNW's continuing right to operate over the line. Assuming that CNW is now capable of repaying BN the funds owed to it, BN's failure to reach some agreement consistent with our July, 1981 decision would be tantamount to denying CNW the means to effectuate the certificate authority granted in 1976.

There must exist terms and conditions to govern ownership and operation of the line. Here, prescription of the terms of a joint line agreement is consistent with prior Commission decisions in which the parties had an obligation to enter into an agreement, *e.g.* where an approved trackage rights agreement had expired and the lessee could not abandon operations without I.C.C. approval. *Thompson* v. *Texas Mexican Ry. Co.*, 328 U.S. 134, 149 (1946); *Chicago and North Western Transp. Co.—Abandonment*, 354 I.C.C. 205, 209 (1978); *Atchison, T. & S. F. Ry. Co.—Operating Agreement*, 331 I.C.C. 367 (1967), modified 333 I.C.C. 342 (1968); *Chicago S.S. and S.B.R. Trackage Rights*, 307 I.C.C. 329 (1959).

Substantive Issues. It appears that negotiations between BN and CNW concerning the Joint Line Agreement are now at a standstill. CNW has taken the position that the terms of the 1975 agreement should serve as a guide to future arrangements. BN disagrees with this approach. BN asserts that changed circumstances since the 1975 agreement was negotiated make at least some of its terms inequitable, and notes that the parties are not bound to follow the terms of the 1975 agreement, as modified by the *Joint Agreement* decision. Pending resolution of the basic issue of what terms are subject to negotiation, BN has not suggested any specific terms during the negotiations conducted to date.

We have not deviated from the position we took in 1976 and reiterated in decisions in 1979 and 1981, that the

line be jointly owned and operated under an agreement negotiated by the parties or arbitrated by the Commission:

> As we have stated in our 1976 decision in Finance Docket No. 27579 we licensed *joint* construction, ownership, and operation of the new line by BN and C&NW; we did not license or approve sole ownership and operation by BN although that option was specifically before us. Joint construction, ownership and operation necessarily call for an agreement to govern their detailed functioning. If the present agreement fails, a new one must be entered into; *and if the parties cannot voluntarily come to terms acceptable to the Commission, the terms must be arbitrated by the Commission in the public interest.* In any event, C&NW cannot now be excluded from participation in the new lines without the Commission's approval, as this would directly contravene our earlier decision calling for joint construction, ownership and operation.

Finance Docket No. 29066 (not printed) served November 30, 1979 (emphasis added); see also *Joint Agreement*, 363 I.C.C. at 920.

We would prefer that BN and CNW reach agreement without the need for Commission intervention. We are convinced that parties are more likely to reach satisfactory terms through negotiation than through unilateral Commission prescription.

Since confusion over the status of the 1975 agreement has apparently caused the current deadlock in negotiations, we will reiterate that we did not prescribe a particular agreement in our *Joint Agreement* decision. We merely approved the agreement negotiated in 1975 by CNW and BN, subject to the removal of certain terms we found anticompetitive and contrary to the public interest. The parties remain free to negotiate any agreement gov-

erning ownership and operation of the line as a Joint Line.[5]

BN and CNW each assert that it is ready and willing in goodfaith to negotiate a new agreement. Nonetheless, negotiations have already consumed over eight months, and they cannot continue indefinitely. Our July 1981 decision specified that CNW would be required to tender its share of project costs to BN by August 23, 1982. To ensure that this date can be met, we plan to set the terms and conditions of the agreement unless BN can persuade us that such action would be ill advised, or unless BN and CNW can reach agreement on their own by the date BN's response to this decision is due.

The parties may believe that, if given additional time, they can successfully negotiate without our intervention, an agreement for joint ownership and use of the line. We stand ready to process quickly an interim trackage rights agreement permitting CNW to use the line pending negotiation of a permanent agreement. We solicit comments from the parties on the feasibility of this alternative.

Should it be necessary for us to prescribe the terms of the permanent agreement, we will need additional data. We therefore are requiring BN and CNW to furnish certain information in response to this decision.

Since the 1975 Agreement, as modified by the Commission, provides specific terms on all of the matters that must be contained in the Agreement, and since both BN and CNW were satisfied with the terms of the 1975 Agreement when negotiated, it provides an appropriate focus for analysis. BN should indicate whether or not it

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[5] A negotiated agreement would, of course, require Commission approval under 49 U.S.C. §§ 11343 and 11344(d). Our review of this agreement would necessarily focus on its competitive effect. The parties should avoid the use of any terms specifically found anticompetitive and hence contrary to the public interest in the *Joint Agreement* decision.

agrees with use of that agreement, as modified by the Commission, as the source of the terms governing ownership and operation of the line. If BN would add to, delete from, or substitute other terms, it should provide us with specific suggested changes and explain why these are preferable to the terms of the 1975 agreement.

BN should also state its figure for CNW's "buy-in" price, and explain in detail the method it used to calculate the components of that figure. We are particularly interested in its derivation of an interest rate on CNW's share of construction costs, and also in any estimation of damages claimed by BN.

If more than one method of calculating CNW's share would be acceptable to BN, it should describe all such options in detail in its response.

BN should provide its estimate of the total cost of construction of the completed line; these costs should be specified by primary account. It should also include a detailed description of any property that is part of the line. For instance, BN should list track weights for all track, and should describe all bridge structures and communications systems.

BN's response will be due 50 days from the date of service of this decision.

CNW is also under an obligation to negotiate in good faith toward a joint agreement. In light of the extensive material submitted with CNW's Petition, CNW need not file an evidentiary submission concurrently with BN. However, CNW will be required to provide a specific response to BN's submission within 75 days of the date of service of this decision.

This schedule will give BN and CNW substantial time for negotiations while ensuring that, if negotiations fail, we would have an adequate opportunity to review the record. We would prefer, of course, that BN and CNW

reach an agreement concerning the Joint Line without further action on our part. However, as we have continuously stated in this proceeding, we intend to ensure that the line is operated as a joint line and will take such action as is necessary, including prescribing the terms of an agreement and enforcing our various decisions, to see that this goal is accomplished.

This decision will not significantly affect either the quality of the human environment or energy consumption.

It is ordered:

1. The petition of the Chicago and North Western Transportation Company is granted to the extent set forth above.

2. The Burlington Northern Railroad Company is ordered to show cause why we should not prescribe the terms and conditions of an agreement to own and operate the joint line.

3. The response of the Burlington Northern Railroad Company incorporating the information discussed in the decision, is due within 50 days of the date of service of this order. Reply from Chicago and North Western Transportation Company is due within 75 days of the date of service of this order.

4. This decision is effective on the date it is served.

By the Commission, Chairman Taylor, Vice Chairman Gilliam, Commissioners Gresham, Sterrett, Andre and Simmons. Commissioner Sterrett concurred with a separate expression. Commissioner Simmons did not participate.

AGATHA L. MERGENOVICH
Secretary

(SEAL)

COMMISSIONER STERRETT, *concurring:*

I join in this decision with some reluctance. C&NW has repeatedly defaulted on its agreements, and yet expects to reap the full measure of its benefits under the agreements. This seems to me fundamentally unfair, and particularly so when its partner has been forced to undertake and complete the venture solely with its own resources. Nonetheless, I am persuaded that these equitable considerations are outweighed by the public interest in achieving additional competition at the least cost and with minimal damage to the environment.

National energy and transportation policies are best served in the Powder River Basin by obtaining additional rail service without redundant rail construction.

INTERSTATE COMMERCE COMMISSION

Finance Docket No. 27579

BURLINGTON NORTHERN, INC., AND CHICAGO AND NORTH WESTERN TRANSPORTATION COMPANY—CONSTRUCTION AND OPERATION—BETWEEN GILLETTE AND DOUGLAS, IN CAMPBELL AND CONVERSE COUNTIES, WYOMING

Decided January 9, 1976

REPORT, CERTIFICATE AND ORDER OF THE COMMISSION

BY THE COMMISSION:

The modified procedure has been followed, and these matters were initially assigned to Review Board Number 5, who certified the proceedings for our disposition.

In Finance Docket No. 27579, by joint application filed February 4, 1974, as supplemented, Burlington Northern, Inc. (BN), and Chicago and North Western Transportation Company (CNW), common carriers by railroad subject to the provisions of part I of the Interstate Commerce Act, seek authority under section 1(18) of the act to construct and operate a line of railroad commencing at milepost 16 on BN's existing Gillette Branch and extending in a southerly direction to Shawnee Junction a distance of 101.1 miles where it will bifurcate and connected with CNW's main line at two points, milepost 521.1 at Shawnee on the east, and milepost 527.8 at Fisher on the west, all in Campbell and Converse Counties, Wyo. The total

[1] Embraces Finance Docket No. 27208, Burlington Northern, Inc. —Construction and Operation Between Douglas and Gillette, Wyo.; and Finance Docket No. 27392, Chicago and North Western Transportation Company—Construction- and Operation in Campbell and Converse Counties, Wyo.

length of the proposed line will be approximately 115.5 miles of which 112.5 miles will be new construction, with the first 9 miles extending south from BN's Gillette Branch to be owned solely by BN and the remaining 103.5 miles to be jointly owned.

In related Finance Docket No. 27208, BN filed on October 10, 1972, an application under section 1(18) of the act seeking authority to construct and operate a line of railroad commencing at milepost 13 on its existing Gillette Branch and extending southerly to a point on its main line near Douglas, a total distance of approximately 126 miles, in Campbell, Converse, Western, and Nisbara Counties, Wyo.

In related Finance Docket No. 27392, CNW's filed on May 29, 1973, an application under section 1(18) of the act seeking authority to construct and operate a line of railroad approximately 76 miles in length from a point on its Chaldron, Nebr., to Casper, Wyo., line of railroad running northerly from milepost 526.40 near Fisher through Converse and into Campbell Counties, Wyo.

By order dated November 15, 1974, as corrected, the Commission ordered that the proceedings in Finance Docket No. 27208, Finance Docket No. 27392, and Finance Docket No. 27579, be consolidated on a common record and set the consolidated proceedings for handling under a common record and set the consolidated proceedings for handling under the modified procedure.

The Commission, on May 24, 1974, determined that the proceedings in Finance Docket No. 27579, the consolidated proceedings, represented a major Federal action significantly affecting the quality of the human environment within the meaning of the National Environmental policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 *et seq.*, and ordered that copies of a detailed draft environmental impact statement (EIS) be served upon the various governmental agencies involved and upon the parties of record

for their comment. On October 8, 1974, the Commisison adopted the detailed final impact statement that had been prepared from the draft impact statement and the comments of the parties and other interested persons.

Various protests against the applications were entered and a verified statement in opposition together with a motion to file said verified statement out of turn was filed jointly by the Sierra Club and the Indiana Chapter of the Wyoming Antelope Hunters Protective Association (hereinafter referred to as either the Sierra Club or protestants). Petitions for leave to intervene and verified statements were filed May 29, 1975, by Mr. and Mrs. Rhea A. Tillard (the Tillards), individually, and on behalf of Landowners Organization (Landowners), an unincorporated association of over 38 resident landowners in Converse and Campbell Counties. Both contend that their petitions will not broaden the scope of the proceedings. Other protestants [2] who did not file verified statements in opposition to the applications in accordance with rule 46(b) of the Commission's General Rules of Practice are deemed to be in default and to have waived any further hearing. These proceedings may now be disposed of without formal proceedings as to the defaulting parties. In addition, three railway unions filed protests to the application in Finance Docket No. 27579, on the grounds that if this transaction is approved, railway employees will be affected.[3]

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[2] Elizabeth R. Jenkins, Powder River Basin Resources Council, Buffalo, Wyo.; Earl Scott, Committee of Landowners, Douglas, Wyo.; Patricia L. Isenberger, Gillette, Wyo.; Dorothy Reno, Big Horn, Wyo.; and Jack Boos, Gillette, Wyo.

[3] The Brotherhood of Locomotive Engineers, Division 624, to which BN filed a reply on February 24, 1975; Local 951 of the United Transportation Union; and the Congress of Railway Unions. The latter two were permitted to intervene by order of the Commission, Comissioner Tuggle, dated April 24, 1975.

The Sierra Club's motion to file its verified statement out of turn because of a miscalculation of the due date will not adversely affect applicants or our determination of the factual support of the transaction. Accordingly, we find that the motion should be granted. The petitions for leave to intervene filed by the Tillards and the Landowners do not broaden the scope of our consideration of the issues involved herein. We, therefore, grant their petitions.

APPLICANTS' EVIDENCE

The line for which authority is sought to construct and operate in the consolidated proceeding will be used in the transportation of low-sulphur coal from mines to be developed in the Powder River Basin which is estimated to contain 8 billion tons of coal reserves. In addition, applicants expect to transport machinery, equipment and supplies used in the development of the mines, mining operations, and the construction and operation of the rail line itself. The line to be constructed will be located in Campbell and Converse Counties, Wyo., which have areas of 4,755 and 4,281 square miles, and populations of 12,957 and 5,933, respectively. The areas are predominately grazing land with some cash grain crops, oil and mining industries which have no common carrier motor service. There are no towns or villages on the proposed line, and the closest towns are Bill, Shawnee, and Orin with populations of 4, 24, and 15, respectively.

Applicants further state that while the primary source of revenue from the proposed line will be the movement of coal, it will be self-supporting, provide an equal opportunity for any industry locating along its line without giving a competitive advantage to any particular industry and will be directly profitable to both carriers. The proposed line will function as a connecting main line between BN's Gillette Branch and BN's and CNW's Casper main line. The coal mined will move southerly and easterly to destinations in the Midwest, South Central and Southwestern United States. It is alleged that rout-

ing coal presently mined on BN's Gillette Branch over the proposed line will result in an average reduction of 100 miles per train movement, and due to its grade and curvature, estimated operating and maintenance-of-way savings of $35,700,000 to $61,900,000 by 1985.

Applicants proposed to construct the line using 132-pound rail with maximum grades of 1.0 percent and maximum curvature of 0.04 degrees. Applicants will pool equipment, revenues, and expenses for traffic originating and terminating on the line.

Applicants assert that coal is particularly suited to transportation by rail and with the vast reserves available and the critical energy crisis, it is conceivable that more than 100 million tons could be transported annually by 1980, and that ultimately this annual tonnage could exceed 300 million tons. They further assert that coal in heavy volume is one of the keys to a railoard's economic success and that the proposed line can only have a highly beneficial impact on each carrier applicant.

The Environmental Impact Statement

The final environmental impact statement (EIS) concerning the proposed development of coal resources in the eastern Powder River Coal Basis of Wyoming was prepared jointly by the Departments of Agriculture and Interior and this Commission, and considered the many comments of both interested persons and parties to these proceedings. This statement, which is part of the record herein, treated the construction applications as one integral transaction and determined that the proposed development will have a significant impact on the human environment. The impacts that were found to occur by the year 1990 are summarized as follows:

1. Ambient air quality will be lowered.

2. Altitude of land surface will be lowered where coal is removed.

3. Vegetation will be destroyed from mining and construction of attendant facilities.

4. Soil structure and parent material will be disrupted and altered on the area to be strip mined.

5. Valuable energy resources will be made available for utilization.

6. Water utilization and consumption will increase for industrial uses, possibly reducing amount available for other uses (agriculture, wildlife, recreation).

7. Unknown archeological and paleontological values may be destroyed.

8. Scenic views will be changed and altered.

9. Wildlife habitats will be altered and some populations will be reduced while others will increase.

10. Recreation use will be intensified.

11. Livestock forage will be reduced during mining operations.

12. Possible overall reduction of the productivity of the mined areas even after reclamation.

13. New transportation networks will be created.

14. Population in the study area will increase.

15. Employment in the study area will be increased.

16. Tax and royalty income will be increased in the study area.

17. Income levels will increase within the study area.

18. All infrastructural facilities will be impacted.

However, it was found that if certain suggested mitigating measures were imposed, the adverse affects upon air

quality, topography, soils, water resources, vegetation, archeological preservation, aesthetics, wildlife and fish, recreation, agriculture, and transportation networks would be lessened. The suggested mitigating measures are set out in appendix A herein.

Further analysis of the EIS reveals that three alternate routes for the proposed rail line were considered for comparison of the effect on the environment.

APPLICANTS' VERIFIED STATEMENTS

BN states that the joint application was filed to reduce environmental complaints, combine operations by the two carriers, and, as submitted reflects the extent of operations proposed by each carrier in their separate applications. It avers that the availability of a great abundance of low-sulphur coal at relatively low prices in northeastern Wyoming has attracted the attention of electric utility and industrial users, that its customers have committed a major portion of new generating capacity to coal produced in the Gillette, Wyo., area, that it has firm commitments for the transporation of 80 million tons annually by 1980 and is engaged in negotiations for another 40 million tons annually; and that, the possibility exists for using the proposed line as a bypass for traffic originating in the Pacific Northwest destined to points in the South and Southwest. BN indicates that it anticipates that coal transportation will increase from 22 to 55 percent of its gross ton-miles by 1982; or from 12 million tons in 1973 to 130 million net tons in the early 1980's. It further avers that its aim is to provide rail transportation of coal utilizing unit trains that are integrated with production and consumption resulting in a high speed, efficient materials flow system.

BN avers that it will construct or arrange for the construction of the line and will solely own and operate that portion 9.0 miles in length, of the proposed line from Amax Junction to a point 1 mile south of the north line

of Township 46 North, called Coal Creek Junction. It states that the remainder, except for the portion of CNW's main line between Fisher to Orin, will be constructed jointly at equal expense with operations thereover carried out on terms to be agreed upon and with each applicant owning an undivided one-half interest in the line including that portion of CNW's main line between Fisher and Orin;[4] that the proposed line will be mainly single track with centralized traffic-controlled sidings; and that the main line will bifurcate at Shawnee Junction, a point 15 miles east of Douglas, with the eastern segment 5.4 miles long, connecting to CNW's main line and the western segment 9.0 miles in length, connecting to BN's east-west line at Orin Junction, 6.0 miles of which will be new construction.[5] The connection with the Gillette Branch will provide BN access to its east-west main line passing through Gillette and Sheridan, Wyo. Applicant states that the route it proposes will require about 112.5 miles of new trackage, the northernmost 9 miles of which will be financed by BN, with construction expected to be completed in three construction seasons.

BN states that because of the marked uniformity of the physical environment of the area, soils, and vegetation patterns, the environmental disruption resulting from an average mile of line along one route will generally not exceed the disruption along the average mile of another route, the shortest alternative will be the least environmentally disruptive.

Applicants aver that during the planning process of formulating a preferred corridor for the line, the four alternates considered were evaluated using a number of

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[4] A separate application will be filed for authority to transfer a one-half interest in this portion of track to BN.

[5] It is contemplated that 3.0 miles of CNW's main track will be upgraded to handle the unit-train traffic.

criteria including length of line and spurs, curvature and gradient, grading, length in badlands terrain, length of flood plains traversed, drainage requirements, road crossings on line and spurs, and the initial cost and cost of operations. Additional review of ranch configurations, rancher opposition, crop and irrigated lands traversed resulted in the selection of Route 3 as the most desirable, even though this route has the greatest rise and fall characteristics, crosses mineable coal reserves and has a deep valley crossing at Antelope Creek. A route Summary of the line characteristics of the four routes proposed by applicants is contained in the attached appendix B.

BN further indicates that the proposed route will cross State and county roads, of which 10 have been designated for grade separations and four for automatic signals. A list of the roads crossed by this proposed route and the type of crossing proposed is contained in appendix C attached hereto.

BN describes the proposed operations as consisting of coal unit trains of 110 cars with five diesel units, three in front and two slaves in the middle, for a total length of 6,600 feet. It avers that a mine producing 10 million tons annually would require three unit trains per day. Its projections indicate 30 train movements per day on the line by the mid 1980's which include bridge movements. The line is designed to accommodate in excess of 50 trains per day in either direction.

BN further indicates that along Route 3 cut slopes of 1½:1 requires 3,575 acres of land whereas 2:1 and 3:1 would displace 3,755 and 4,995 acres respectively. It states that cut and fill slopes of 1½:1 and 1¾:1 can be successfully revegetated with adapted grass species, and that herbicides used for weed control programs do not move laterally where the annual precipitation is only 12-14 inches.

Based upon 1975 prices as presently projected, applicants estimate that the proposed Route 3 will cost $74,100,000 of which $73,800,000 will be capitalized. Each applicant will be responsible for 50 percent of said capitalization. A detailed cost estimate of construction and operating costs for the proposed route is attached as appendix D. BN further estimates that it will invest an additional $31 million in locomotive power and cabooses. Investment funds for construction will be made available from either internally generated funds, financial arrangements for general corporate purposes, or equity or quasi-equity capital or straight debt. Funds for locomotives and cabooses will be raised by a combination of equipment trust borrowing with the 20 percent down payment portion secured through the above-listed sources, and long-term leases.

CNW avers that it had not made arrangements for the financing of its portion of the cost of the proposed line but views its participation in the project as a new opportunity for it to provide service at renumerative rates. It states that the proposed alternate route paralleling Highway 59 is undesirable in that it requires a greater number of cuts and fills; wider rights-of-way; greater disturbance of soil surface; and an increased amount of fencing. CNW further comments that the mitigating measure requiring 3:1 slopes on cuts or 40 feet or less and 2:1 slopes on cuts of over 40 feet would require more land taking and land movement. It further states that its chief use of the proposed joint line will be the transportation of low-sulphur coal to consumers in the Midwest, South, Southwest, and Southeast, with primary users being industries and electric utilities. The proposed line will give CNW access to Arco's Black Thunder Mine and Kerr-McGee's Jacobs Ranch Mine and to other mines south of Coal Creek Junction. It believes that development can be accomplished without any material damage to the environment.

VERIFIED STATEMENTS IN SUPPORT OF THE APPLICATION

Kerr-McGee Corp. of Oklahoma City, Okla., states that there is approximately 300 million net tons of marketable low-sulphur coal reserves at its soon to be constructed Jacobs Ranch Mine. It further states that it holds long-term contracts for the sale and delivery to (1) Arkansas Power and Light Company of 100 million net tons starting July 1, 1977, at an annual rate of 5 million tons with an option for an additional 50 million net tons; (2) Central Louisiana Electric Company of 50 million net tons with delivery to begin July 1, 1978, at an annual rate of 3,400,000 net tons; and (3) Gulf States Utility Company of 50 million net tons with delivery to begin March 1, 1977, at an annual rate of 2,500,000, net tons. It plans to construct a 3,900-ton per hour handling facility, storage for 60,000 tons, and a unit-train loading system capable of handling 6,000 tons per hour all to be in operation by mid-1976. It avers that it is essential that it have rail services by July 1, 1976, and requests the Commission to issue the certificate as promptly as possible.

Atlantic Richfield Company, a Pennsylvania corporation, states that it has reserves at its Black Thunder and Coal Creek Mines, both in Campbell County. It avers that it has coal contracts with (1) Nebraska Public Power District providing for 1.8 million tons per year starting July 1, 1977; (2) Oklahoma Gas and Electric Company providing for 3 million tons per year starting July 1, 1976; and (3) Southwestern Public Service Company for 2 million tons per year starting September 1975, with options to increase this annual tonnage from its Black Thunder mine to 12.6 million tons. It avers that this coal must move by rail and thus the construction and operation proposed is absolutely essential.

Iowa Power and Light of Des Moines, Iowa, states that it currently receives via BN 240,000 tons annually from the Belle Ayre mine of Amax Coal Company. This will increase to 1.5 million tons in 1978 and to over 2 million

tons under the terms of a 20-year contract. It further states that rail service is critical to its operation and avers that the proposed line will provide a necessary alternate route for the transportation of coal by BN.

Kansas City Power and Light Co., Kansas City, Mo., avers that it has contracted for 1.8 million tons of coal annually for the next 20 years from the Amax Coal Company, Belle Ayre mine, to be moved in unit-train service. It states that proposed scheduled train operations are directly dependent upon the availability of the proposed line.

The Oklahoma Gas and Electric Company states that it has contracted with Atlantic Richfield for the delivery of 3 million tons annually starting in July 1976, and it is necessary that transportation facilities required to deliver the coal be constructed so it will not have to curtail service to its customers.

The Public Service Company of Tulsa, Okla., indicates that negotiations are underway for the purchase of 50 million tons of coal from the Powder River Basin and that it will require the proposed rail service.

The Omaha Public Power District of Omaha, Nebr., avers that its interest herein arises from a contract which is being finalized with an established producer for the purchase of 2 million tons of coal from 1979 through 1985 and for 1.4 million tons from 1986 through 1998. It is concerned that reliable shipping facilities will not be available to handle the substantial additional volume of coal that must be moved.

Southwestern Electric Power Company, Shreveport, La., indicates that it has a contract with Amax Coal Company for the delivery of 175 million tons of coal from its Belle Ayre mine over 25 years starting in 1977 and that the proposed line will provide it an alternate route for the transportation of the coal to be shipped from the area.

The Kansas Power and Light Company, Topeka, Kans., states that it has contracted with Amax Coal Company from its Belle Ayre mine starting in 1977 for expected volume of 7.5 million tons per year. The proposed rail line will be utilized for this traffic and it is critical to its operations that it receive the tonnage as scheduled.

VERIFIED STATEMENTS IN OPPOSITION

In its verified statement in opposition, the Sierra Club states that sections 4332(a)(A) and (c) of NEPA require the Commission to prepare and consider a comprehensive environmental impact statement as well as interdisciplinary studies concerning the relationship of the proposed railroad line to the entire coal development of northeastern Wyoming, eastern Montana, and western North and South Dakota before it can act to approve construction of the proposed rail line. It contends that the line is an integral part of the massive development of coal reserves in the northern Great Plains region, and that an impact statement in the region must be prepared before the application can be approved. Sierra Club submits that the EIS prepared is not adequate to comply with NEPA because it considers only four strip mines, the rail line and Campbell and northern Converse Counties whereas the Eastern Powder River Coal Basin also embraces portions of Natrona, Johnson, Sheridan, Weston, and Niobara Counties.

The Sierra Club avers that the Court of Appeals for the District of Columbia Circuit has before it the identical issue in *Sierra Club* v. *Morton*, No. 74-1389, and the court's decision will determine if NEPA requires the preparation of an impact statement on the northern Great Plains region before major Federal actions are taken. It attached the briefs it submitted to the Court of Appeals as its legal position and points out that said court by order dated January 3, 1975, enjoined the Federal Government from taking any action concerning the mining

plans and railroad rights-of-way pending further order. It thus concludes that the Commission cannot validly approve the construction of the proposed railroad and must either disapprove or hold the application in abeyance until the regional statement is prepared.

In a reply filed February 24, 1975, BN avers that the issue of a regional impact statement is being litigated and is not an issue to be determined by the Commission. It states that the adequacy of the impact statement is only being challenged indirectly through the assertion that no environmental impact statement would be adequate except one that covers all conceivable private and Federal actions remotely traced to coal development in a five-State area. BN attached copies of the order of the United States District Court for the District of Columbia which found a regional impact statement unnecessary and the brief filed with the Circuit Court of Appeals. BN further contends that a certificate can be issued because the Commission participated in the preparation and adoption of the EIS.

On March 4, 1975, Sierra Club, pursuant to rule 51 of the Commission's General Rules of Practice, 49 CFR 1100.51, filed a motion for leave to respond to a BN reply in order to correct a misleading response created in that reply. In their reply filed March 20, 1975, applicants contend that said motion be denied and the response stricken because it is, in effect, a reply to a reply, which is not permitted under the Commission's Rules of Practice, and because its sets forth no issues of fact or law. However, rule 51 provides in pertinent part:

> No further reply may be made by any party except by permission of the Commission.

In our opinion, the protestants have offered sufficient cause for granting it special permission to "reply to a reply" in order to clarify whether the Federal actions restricted by the injunction apply to action by the Commission on the

applications. Since this pleading sets forth an issue of law, and since applicants would not be prejudiced by our finding, we hereby grant the motion under rule 51 and accept the pleading as evidence in this proceeding.

On July 10, 1975, the Sierra Club filed a supplemental statement to bring to our attention the decision that had been handed down in *Sierra Club* v. *Morton*, 514 F.2d 856 (1975). The court, they aver, determined that the actions of the various Federal agencies concerning the development of coal reserves in the region was a major Federal action and remanded the case to the district court to determine whether the time was ripe for a comprehensive regional impact statement. The court did continue in effect the injunction it had issued earlier this year.

In their verified statement, the Tillards aver that Tillard Road will be severed by the railroad construction and that they stand to lose access to schools, hospitals, churches, communities, and parts of their ranches if a separated crossing is not constructed. They state that six named oil companies currently use the road; that two of the three families living on their ranch have children in school, and that access will be absolutely denied them while trains are passing.

The Landowners, in their verified statement, contend that as a result of the construction, they will lose free access to communities and among the ranches; that drainage will be disrupted; and that vibration, noise, the number of and potential risk of range fires, and danger to livestock will be increased. They further contend that the most significant impact is the loss of access to schools, hospitals, churches, communities, and parts of their ranches. The Landowners state that of the 21 listed county roads in the EIS, separated crossings are planned for only two. They contend that the failure to construct overpasses or underpasses at these roads imposses a permanent hardship on school children and impairs the

ability of the people seeking emergency medical attention. It is further averred that the increased construction costs, which can be passed on by the railroads to their customers, are less than the cost to the Landowners of the permanent impairment of daily access.

Discussion and Conclusions

We have before us three separate applications that have been consolidated for our consideration. The joint application, in Finance Docket No. 27579, was filed at the Commission's request to avoid the construction of essentially parallel lines by the applicants. Two railroads serving the same territory over separate lines would result in wasteful and improvident expendituures for construction which are not necessary to insure adequate service, especially in view of the environmental and financial considerations involved. Accordingly, our consideration herein will be limited to the joint application and the separate applications of BN and CNW will be dismissed.

Under section 1(18) of the act, we must determine whether the present or future public convenience and necessity requires or will require the construction and operation of the proposed line. The Commission has recognized the fact that interests of shippers are matters of substantial importance in determining the question of public convenience and necessity in railroad construction applications, cf. *Chesapeake & O. Ry. Co. Construction*, 267 I.C.C. 665. The evidence submitted indicates that vast reserves of low-sulphur coal are located in the territory to be served. The evidence submitted by the users and producers of the coal in the area to be served by the line is more than sufficient to convince us that there is a present and growing need for the service planned. While some of the requirements discussed in their verified statements will come from mines that are already in operation and have existing rail service, it was shown that some of this traffic will be able to utilize the proposed

line with resulting savings in distance and locomotive power and equipment due to more direct routes and lesser curvatures and grades. Overall, this evidence indicates that most of the traffic would be new traffic for both applicants and would not affect other existing carriers, and is more than sufficient to show a need for the proposed line.

By letter dated October 22, 1975, the Commission requested the applicants to furnish their latest available financial statements together with an indication as to how the capital needed for construction of the proposed line and purchase of revenue equipment would be generated. Responses were filed by each applicant on November 17, 1975.[6]

BN's response consisted of a verified statement, a balance sheet dated September 30, 1975, and an income statement for the first 9 months of 1975. The income statement is attached as appendix E.

BN states that of its approximately $37 million share in the cost of the line, it expects to spend $8.5 million in 1976, $8.6 million in 1977, $10 million in 1978, and $9.9 million in 1979. It further states that while it has no financings specifically earmarked for the line construction, in its 5-year projections, it expects said construction will be funded out of general corporate funds with interim construction financing provided by its $100 million revolving credit agreement. It indicates that it anticipates the sale of two long-term debt issues of $60 million and $75 million in 1976 and 1978, respectively, in addition to the internal generation of from $152.5 million to $319.6 million per year from 1976 to 1980 and believes that the proposed line construction can be funded without additional financing while maintaining sufficient cash reserves and working capital. It estimates that it will transport

[6] The Commission's letter and the applicants' responses were served upon all parties of record.

5,100 tons in the first year of operation with the annual tonnage increasing to 54,125 tons in the fifth year.

CNW's submission included its balance sheet dated September 30, 1975, and its income statement for the 9 months ended September 30, 1975. The income statement is attached as appendix F.

CNW states that it cannot ascertain the precise date that construction will begin nor determine what the general lending market will be, the rate of interest that will be charged, from when and how the required funds will be borrowed, nor the effect upon its ability to service its long-term debt. It further states that it has no way to project earnings without assuming volumes and rate levels and that it feels that assumptions made at this time would not be sufficiently precise.

CNW does state that while numerous factors have served to set back the project by several years, it anticipates moving 30 million tons of coal annually from origins along the proposed line by the fifth year of operation. It further avers that it would have to reevaluate its position if the proposed coal slurry pipelines are permitted, and that it will not embark on the project until its providence is assured.

CNW finally states that the cars will be shipper- or receiver-owned but if railroad-owned cars are required, they would be financed through standard mechanisms as will be the locomotives and cabooses.

Another matter to be considered in determining if the public convenience and necessity require the construction of the line is the possibility of profitable operations. This is likewise amply supported by the record. The cost $74,100,000 at 1975 prices, appears reasonable under the circumstances. Both applicants aver that they have not as yet made financing arrangements for the costs of construction or the purchase of operating equipment. The record indicates that the territory to be served will gen-

erate considerable traffic which the applicants anticipate will be profitable as long as the line is in operation.

In this respect, it appears that the cost of financing the estimated $31 million of equipment which Burlington Northern will require to operate the line will require approval under section 20a insofar as equipment trust financing will be utilized. With regard to the cost of financing the line itself, the form or forms which such financing will assume is not clear at this time. Our prior approval will be required to the extent that the issuance of securities or the assumption of obligation or liability in respect of securities within the meaning of section 20a of the Interstate Commerce Act becomes necessary. It is important, in this respect, to consider the potential viability of the line in light of the substantial volume of traffic which applicants estimate will be generated by the mining operations which will rely upon the line for transportation. See *Construction of Line by Wenatchee Southern Ry. Co.*, 90 I.C.C. 237, 256-257 (1924).

This circumstance, as well as consideration of the Nation's need for alternative sources of energy which, in part, could be met by the low-sulphur coal traffic to be transported by the line, and the fact that applicants apparently will require our prior approval under section 20a in order to effect the construction authorized herein, in our opinion, does not require a further assessment of the feasibility and fairness of the plans to finance the proposed line at this time. However, jurisdiction is reserved for the purpose of making such further conditions in this and other respects as may be required to ensure that approval will not impair applicants' present or future operations. Accordingly, we will expect our responsible bureaus to make such examinations as may be necessary from time to time so that our intent and purpose may be realized. This reservation of jurisdiction coupled with our jurisdiction under section 20 of the act will permit us to continue to review applicants' financial stature, obtain

necessary financial data, and, if required, attach additional conditions to this authorization to ensure applicants' continued financial viability.

The proposed construction will have no detrimental effect to any existing carriers and will permit the future development of a territory that presently has no rail service. Thus, construction of the line of railroad is warranted by the record and in the public interest.

While several routes for the proposed line were considered in the development of the EIS, for comparison of the impacts involved, we have determined that the route proposed by applicants is the most feasible. Additionally, the Commission found in *Construction by A. & W. N. C.R.R.*, 111 I.C.C. 557, 564, that the spirit of the act as well as the necessity of the most definite and complete evidence that can be secured require the selection of a single route for consideration rather than a number of alternate routes. Thus, we will consider only the routes proposed by the applicants and all our discussions will be limited to that route.

The protests to the application concern issues relating to whether the EIS complies with section 4322(2)(A) and (C) of NEPA and the type and number of road crossings to be provided.

Section 4332(2) of NEPA provides, in part, that to the fullest extent possible, all agencies of the Federal Government shall:

> (A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social science and the environmental design arts in planning and in decision-making which may have a impact on man's environment:
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> • • • •
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal ac-

tions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

As the Sierra Club contends, the final EIS considers only the Eastern Powder River Basin and does not attempt to cover the regional area they suggest.

We have reviewed the final environmental impact statement and find that it is adequate in all respects and meets the procedural requirements in NEPA. The adequacy of the impact statement was not an issue in the *Sierra Club* v. *Morton* suit and there was no finding in that decision that the statement was inadequate. On this basis, the Commission finds that its participation in the development and publication of the EIS meets the mandate of NEPA, as set out above.

Protestants further contend that the identical issue is presently pending in *Sierra Club* v. *Morton* in the Federal courts in the District of Columbia. Neither this Commission nor the applicant railroads are parties to this proceeding. Some 79 miles of the proposed line, including the northernmost 40 miles, cross private lands and construction thereon does not require permits from either the Departments of Interior or Agriculture. The orders of

this Commission are based upon a review of and in consideration of the entire evidence of record, including the environmental review and determination previously made herein, which has accompanied the application throughout the decisional process and has been considered in light of our findings herein. In compliance with the Interstate Commerce Act, we must determine if a construction application is within the public interest and if so, provided we find that compliance was made with other statutory mandates, a certificate must be issued.

The Sierra Club's contention that, since the Federal Government is enjoined from taking action until it is finally determined if a regional study is necessary, this Commission cannot validly approve the application is without merit. The injunction orders the Secretary of Interior to take no action concerning the mining plans and railroad rights-of-way, pending further order of this court. The Bureau of Land Management of the Department of Interior and the Department of Agriculture grant right-of-way permits where the line crosses Federal land under their control. In our view, this injunction only embraces actions by the Departments of Interior and Agriculture and Corps of Engineers and in no way restricts this Commission's authority to approve the application.

Other protestants, the Tillards and the Landowners, contend that the construction of the rail line will absolutely deny them access to communities, schools, hospitals, churches, and parts of their ranches which the 6,600-foot long trains are passing.

Under section 1(20) of the act this Commission may attach to the issuance of a certificate such terms and conditions as in its judgment the public convenience and necessity may require.

If the use of the line develops as expected by applicants to 45 or 50 trains per day, these protestants may be

denied the access to their properties for substantial periods during each day. This imposes a hazard for their safety and welfare as well as to that of the general public. Accordingly, we find that the public convenience and necessity require that our approval be conditioned to require that the applicants provide a suitable and safe means of ingress and egress from and to the protestant's property, subject to State and county requirements.

Finally, it should be noted that each of the applicants proposes to develop the coal traffic for shipment over its individually owned lines for use in facilities located within its own territory. The present energy crisis has substantially increased the need for utilization of coal in the manufacture of energy. The coal of low sulphur content, is especially suitable for use in coal burning facilities which have been unable to use other coal because of environmental requirements. Although applicants indicate territories to be supplied which are principally in the Midwest, there are indications that the coal will move to all areas of the Nation.

The imposition of certain mitigating measures suggested in the EIS will lessen the impact of the construction and operation upon the human environment. However, in their verified statements, applicants contends that certain of these measures are unnecessary. The EIS suggest that construction slopes on grades of 40 feet or less shall be on a 3:1 slope and those greater than 40 feet shall not exceed a 2:1 slope. Applicants contend that said slopes will require the taking of more land, will displace more cattle, and slopes of 1½:1 and 1¾:1 can be successfully revegetated. They further contend that the measure requiring the application of herbicides in a manner to keep them out of all waters is unnecessary because the herbicides used by the applicants do not move laterally where the annual precipitation is 12-14 inches annually.

We have considered the arguments of the applicants and conclude that the measures pertaining to construction

slopes and the application of herbicides are reasonable environmentally. However, the suggested measures which require the construction of temporary fencing, the compliance with Federal and State air quality laws, regulations and standards, and the use of Federal and State approved chemicals in the treatment of service roads do not appear to be necessary and will not be imposed. With these exceptions, the suggested measures are reasonable environmentally and should, in the public interest, be incorporated as conditions in our certificate and order. Our approval herein will be conditioned upon the imposition of the same employment protective conditions as contained in *Chicago, B.&O. R. Co., Abandonment*, 257 I.C.C. 700.

Contentions of the parties as to law or fact not specifically discussed in this report have been considered and found to be without material significance or not justified.

We further find, that the present and future public convenience and necessity require the construction and operation by Burlington Northern, Inc., and Chicago and North Western Transportation Company of a line of railroad in Campbell and Converse Counties, Wyo., as described above.

An appropriate certificate and order will be entered.

COMMISSIONER O'NEAL, dissenting in part:

I believe that the Chicago and North Western has not provided evidence that could be considered sufficient under longstanding ICC requirements to demonstrate its ability to finance the proposed construction and operation without detracting from its ability to perform its common carrier obligation.

49 U.S.C. § 10901. Authorizing construction and operation of railroad lines

(a) A rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may—

(1) construct an extension to any of its railroad lines;

(2) construct an additional railroad line;

(3) acquire or operate an extended or additional railroad line; or

(4) provide transportation over, or by means of, an extended or additional railroad line;

only if the Commisson finds that the present or future public convenience and necessity require or permit the construction or acquisition (or both) and operation of the railroad line.

(b) A proceeding to grant authority under subsection (a) of this section begins when an application is filed. On receiving the application, the Commission shall—

(1) send a copy of the application to the chief executive officer of each State that would be directly affected by the construction or operation of the railroad line;

(2) send an accurate and understandable summary of the application to a newspaper of general circulation in each area that would be affected by the construction or operation of the railroad line;

(3) have a copy of the summary published in the Federal Register;

(4) take other reasonable and effective steps to publicize the application; and

(5) indicate in each transmission and publication that each interested person is entitled to recommend

to the Commission that it approve, deny, or take other action concerning the application.

(c) (1) If the Commission—

(A) finds public convenience and necessity, it may—

(i) approve the application as filed; or

(ii) approve the application with modifications and require compliance with conditions the Commission finds necessary in the public interest; or

(B) fails to find public convenience and necessity, it may deny the application.

(2) On approval, the Commission shall issue to the rail carrier a certificate describing the construction or acquisition (or both) and operation approved by the Commission.

(d) (1) Where a rail carrier has been issued a certificate of public convenience and necessity by the Commission authorizing the construction or extension of a railroad line, no other rail carrier may block such construction or extension by refusing to permit the carrier to cross its property if (A) the construction does not unreasonably interfere with the operation of the crossed line, (B) the operation does not materially interfere with the operation of the crossed line, and (C) the owner of the crossing line compensates the owner of the crossed line.

(2) If the carriers are unable to agree on the terms of operation or the amount of payment for purposes of paragraph (1) of this subsection, either party may submit the matters in dispute to the Commission for determination.

(e) The Commission may require any rail carrier proposing both to construct and operate a new railroad line

pursuant to this section to provide a fair and equitable arrangement for the protection of the interests of railroad employees who may be affected thereby no less protective of and beneficial to the interests of such employees than those established pursuant to section 11347 of this title.

49 U.S.C. § 11701. General authority

(a) The Interstate Commerce Commission may begin an investigation under this subtitle on its own initiative or on complaint. If the Commission finds that a carrier or broker is violating this subtitle, the Commission shall take appropriate action to compel compliance with this subtitle. The Commission may take that action only after giving the carrier or broker notice of the investigation and an opportunity for a proceeding.

(b) A person, including a governmental authority, may file with the Commission a complaint about a violation of this subtitle by a carrier providing, or broker for, transportation or service subject to the jurisdiction of the Commission under this subtitle. The complaint must state the facts that are the subject of the violation and, if it is against a water carrier, must be made under oath. The Commission may dismiss a complaint it determines does not state reasonable grounds for investigation and action. However, the Commission may not dismiss a complaint made against a common carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title because of the absence of direct damage to the complainant.

(c) A formal investigative proceeding begun by the Commission under subsection (a) of this section is dismissed automatically unless it is concluded by the Commission with administrative finality by the end of the 3d year after the date on which it was begun.

49 U.S.C. § 11343. Consolidation, merger, and acquisition of control

(a) The following transactions involving carriers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I (except a pipeline carrier), II, or III of chapter 105 of this title may be carried out only with the approval and authorization of the Commission:

(1) consolidation or merger of the properties or franchises of at least 2 carriers into one corporation for the ownership, management, and operation of the previously separately owned properties.

(2) a purchase, lease, or contract to operate property of another carrier by any number of carriers.

(3) acquisition of control of a carrier by any number of carriers.

(4) acquisition of control of at least 2 carriers by a person that is not a carrier.

(5) acquisition of control of a carrier by a person that is not a carrier but that controls any number of carriers.

(6) acquisition by a rail carrier of trackage rights over, or joint ownership in or joint use of, a railroad line (and terminals incidental to it) owned or operated by another rail carrier.

(b) A person may carry out a transaction referred to in subsection (a) of this section or participate in achieving the control or management, including the power to exercise control or management, in a common interest of more than one of those carriers, regardless of how that result is reached, only with the approval and authorization of the Commission under this subchapter. In addition to other transactions, each of the following transac-

tions are considered achievements of control or management:

(1) A transaction by a carrier has the effect of putting that carrier and persons affiliated with it, taken together, in control of another carrier.

(2) A transaction by a person affiliated with a carrier has the effect of putting that carrier and persons affiliated with it, taken together, in control of another carrier.

(3) A transaction by at least 2 persons acting together (one of whom is a carrier or is affiliated with a carrier) has the effect of putting those persons and carriers and persons affiliated with any of them, or with any of those affiliated carriers, taken together, in control of another carrier.

(c) A person is affiliated with a carrier under this subchapter if, because of the relationship between that person and a carrier, it is reasonable to believe that the affairs of another carrier, control of which may be acquired by that person, will be managed in the interest of the other carrier.

(d) (1) Approval and authorization by the Commission are not required if the only parties to a transaction referred to in subsection (a) of this section are motor carriers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title and the aggregate gross operating revenues of those carriers were not more than $2,000,000 during a period of 12 consecutive months ending not more than 6 months before the date of the agreement of the parties covering the transaction. However, the approval and authorization of the Commission is required when a motor carrier that is controlled by or affiliated with a carrier providing transportation subject to the jurisdiction of the Commission under subchapter I of that chapter is a party to the transaction.

(2) The approval and authorization of the Commission are not required if the only parties to a transaction referred to in subsection (a) of this section are street, suburban, or interurban electric railways that are not controlled by or under common control with a carrier that is operated as part of a general railroad system of transportation.

(e) (1) Notwithstanding any provisions of this title, the Interstate Commerce Commission, in a matter related to a motor carrier of property providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title, may exempt a person, class of persons, transaction, or class of transactions from the merger, consolidation, and acquisition of control provisions of this subchapter if the Commission finds that—

(A) the application of such provisions is not necessary to carry out the transportation policy of section 10101 of this title; and

(B) either (i) the transaction is of limited scope, or (ii) the application of such provisions is not needed to protect shippers from the abuse of market power.

(2) At least 60 days before any transaction exempt under this subsection from the merger, consolidation, and acquisition of control provisions of this subchapter may take effect, each carrier intending to participate in such transaction shall file with the Commission a notice of its intention to participate in such transaction and shall give public notice of such intention. The Commission shall prescribe the information to be contained in such notices, including the nature and scope of the transaction.

(3) The Commission, on its own initiative or on complaint, may revoke an exemption granted under this subsection, to the extent it specifies, when it finds that application of the provisions of this section to the person,

class of persons, or transportation is necessary to carry out the transportation policy of section 10101 of this title.

(4) If the Commission, on its own initiative, finds that employees of any carrier intending to participate in a transaction exempt under this subsection from the merger, consolidation, and acquisition of control provisions of this subchapter are or will be adversely affected by such transaction or if employees of such carrier adversely affected by such transaction file a complaint concerning such transaction with the Commission, the Commission shall revoke such exemption to the extent the Commission deems necessary to review and address the adverse effects on such employees.

49 U.S.C. § 11344. Consolidation, merger, and acquisition of control: general procedure and conditions of approval

(a) The Interstate Commerce Commission may begin a proceeding to approve and authorize a transaction referred to in section 11343 of this title on application of the person seeking that authority. When an application is filed with the Commission, the Commission shall notify the chief executive officer of each State in which property of the carriers involved in the proposed transaction is located and shall notify those carriers. If a motor carrier providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title is involved in the transaction, the Commission must notify the persons specified in section 10328(b) of this title. The Commission shall hold a public hearing when a rail carrier providing transportation subject to the jurisdiction of the Commisison under subchapter I of that chapter is involved in the transaction unless the Commission determines that a public hearing is not necessary in the public interest.

(b)(1) In a proceeding under this section which involves the merger or control of at least two class I rail-

roads, as defined by the Commission, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(E) whether the proposed transaction would have an adverse effect on competition among rail carriers in the affected region.

(2) In a proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter II of chapter 105 of this title, the Commission shall consider at least the following:

(A) the effect of the proposed transaction on the adequacy of transportation to the public.

(B) the effect on the public interest of including, or failing to include, other rail carriers in the area involved in the proposed transaction.

(C) the total fixed charges that result from the proposed transaction.

(D) the interest of carrier employees affected by the proposed transaction.

(c) The Commission shall approve and authorize a transaction under this section when it finds the transaction is consistent with the public interest. The Commission may impose conditions governing the transaction. When the transaction contemplates a guaranty or assump-

tion of payment of dividends or of fixed charges or will result in an increase of total fixed charges, the Commission may approve and authorize the transaction only if it finds that the guaranty, assumption, or increase is consistent with the public interest. When a rail carrier, or a person controlled by or affiliated with a rail carrier, is an applicant and the transaction involves a motor carrier, the Commission may approve and authorize the transaction only if it finds that the transaction is consistent with the public interest, will enable the rail carrier to use motor carrier transportation to public advantage in its operations, and will not unreasonably restrain competition. When a rail carrier is involved in the transaction, the Commission may require inclusion of other rail carriers located in the area involved in the transaction if they apply for inclusion and the Commission finds their inclusion to be consistent with the public interest.

(d) In a proceeding under this section which does not involve the merger or control of at least two class I railroads, as defined by the Commission, the Commission shall approve such an application unless it finds that—

(1) as a result of the transaction, there is likely to be substantial lessening of competition, creation of a monopoly, or restraint of trade in freight surface transportation in any region of the United States; and

(2) the anticompetitive effects of the transaction outweigh the public interest in meeting significant transportation needs.

In making such findings, the Commission shall, with respect to any application that is part of a plan or proposal developed under section 5(a)-(d) of the Department of Transportation Act (49 U.S.C. 1654(a)-(d)), accord substantial weight to any recommendations of the Secretary of Transportation. The provisions of this sub-

section do not apply to any proceeding under this section which involves only carriers of passengers providing transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title.

(e) A rail carrier, or a person controlled by or affiliated with a rail carrier, together with one or more affected shippers, may apply for approval under this subsection of a transaction for the purpose of providing motor carrier transportation prior or subsequent to rail transportation to serve inadequately served shippers located on a railroad other than the applicant carrier. Such application shall be approved by the Commission if the applicants demonstrate presently impaired rail service and inadequate motor common carrier service which results in the serious failure of the rail carrier serving the shippers to meet the rail equipment or transportation schedules of shippers or seriously to fail otherwise to provide adequate normal rail services required by shippers and which shippers would reasonably expect the rail carrier to provide. The Commission shall approve or disapprove applications under this subsection within 30 days after receipt of such application. The Commission shall approve applications which are not protested by interested parties within 30 days following receipt of such application.

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.